*The Daily Register* (*the New York Official Law Journal*),

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# Judge Hoffman's Treatise on Referees,

Says: "A work on the law and practice of referees is one which every lawyer in New York City will find use for. It is here that more causes are disposed of by references than in the Courts, and many more appeals are from the decisions of referees than from Judges.

"The book before us shows that the author of it has availed himself of all the latest decisions and the new rules of the Supreme Court, and all other sources of useful practical knowledge relating to the subject of which he treats.

"No man can be better qualified by experience and study to be the author of a work on the 'Law of Referees' than Ex-Judge Murray Hoffman, blending, as it necessarily must, a knowledge of the duties of a Master and Examiner in Chancery with that of a Judge at Nisi Prius.

"While Judge Hoffman was a Master in Chancery he was the author of the well-known work on the duties of that office, and Chancellor Kent commended it by expressing his 'high opinion of the accuracy, utility, credit, and value of the work.'

"After this he became Assistant Vice-Chancellor in New York City, and published his opinions and decisions, which are known as 'Hoffman's Chancery Cases.' He is also the author of N. Y. Chancery Practice, in three volumes.

"Under the new New Constitution and the Code of Procedure he was for many years a Justice of the N. Y. Superior Court, and since the expiration of his term of office has been principally acting as referee."

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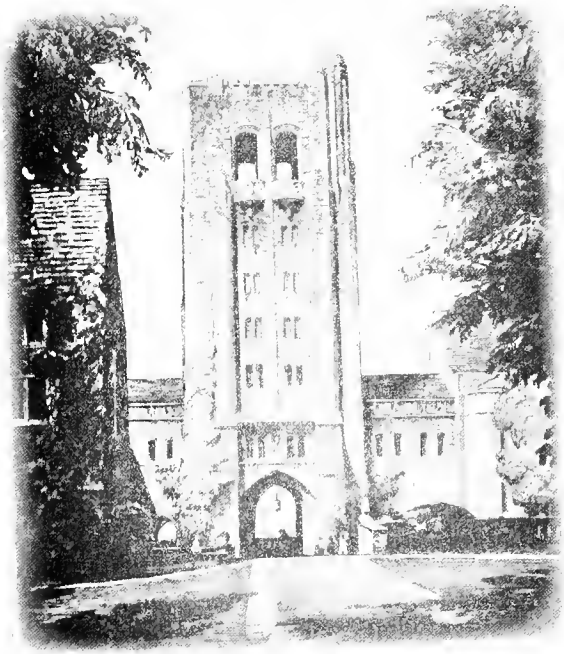

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THE

# LAW AND PRACTICE

AS TO

# REFERENCES,

AND THE POWERS AND DUTIES

OF

REFEREES,

WITH

NUMEROUS FORMS.

BY

MURRAY HOFFMAN,

AUTHOR OF "OFFICE AND DUTIES OF MASTERS IN CHANCERY,"
"CHANCERY PRACTICE," ETC., ETC.

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# INTRODUCTION.

THE office of a referee under the Code of New York has been greatly varied and enlarged from that which was held under the former law and practice, or was held by a Master in Chancery, whose functions he now fills to a certain extent.

1. In a number of cases—in all by consent of parties and Court—he may become vested with the jurisdiction of a judge, but yet for that particular case only. His decision in that case is equivalent to the judgment of a Court at Special Term, and only reviewable in the same manner.

In Woodruff *vs.* Dickie (31 Howard's Pr. Rep., 164) the Court says: "Referees are no longer officers of or under the control of the Court. They become by appointment an independent tribunal, having such powers as are given by the statute; and their decisions are reviewed only on appeal from their judgments."

So in Palmer *vs.* Palmer (13 How. Pr. Rep., 365) the Court says, after citing the 272 section: "This section confers upon the referee complete jurisdiction over the cause, as much so as any judge could possess at Special Term for its trial; and the mode of con-

ducting the trial is within the discretion of the referee, so far as relates to all questions within the ordinary discretion of a judge on the trial of a cause."

These propositions are accurate and definite in every case in which the Code has explicitly, or by plain inference, conferred such power upon a referee. But in interpreting the clauses vesting such judicial power, we must remember, that a referee is the creature of a statute and an order. He is a judge only for that particular cause which is delegated to him. A liberal construction of powers conferred is warranted. But something must exist professing to give the power. It is not the case of an established Court, with cases of a new jurisdictional character vested in it, but a case of such power specially granted in relation to one particular cause. In the one case, the prior judicial authority may be resorted to when not restricted; in the other, the express provisions fairly construed, afford the only guide.

This distinction is adverted to in the case of Andrews *vs.* Illiott (32 Eng. L. & Eq. Rep., 311; cited 3 Abbott's Pr. Rep., 171, Note).

In the case of Ford *vs.* Ford (53 Barbour R., 525) Justice James delivered an opinion restricting the propositions in Woodruff *vs.* Dickie, above cited. He held that the *Court* at Special Term on motion made at any time before verdict, had power to allow amendments to pleadings by the insertion of a new cause of action or a new defence. But the power of

the Court to do this on *the trial of a cause* was a different thing. It did not exist before the Code, and was not conferred by it. The power of a referee on a trial, was by section 272, the same as of the *Court on a trial of a cause.* He enters into a minute examination of the authorities, and concludes that it is quite certain that the Court *at the trial* does not possess the power to allow a new cause of action or a new defense to be introduced.

See also Bigelow *vs.* Dunn (52 Barbour, 570) to the same effect.

Thus we have a guide as to the power of a referee upon a trial of a cause—of all the issues in it. We are to ascertain what is the authority of a judge upon such a trial. The referee possesses the same, unless specially withheld or varied.

2. But next, referees, under other provisions of the Code, occupy the position, and discharge the duties of Masters in Chancery of the former system and practice. In one large branch of this class of cases, the referee is to state results, opinions, or suggestions for the Court to act upon, to embody in an order or judgment, but not in themselves equivalent to an order or judgment. He reports that one party is indebted as the result of an account, in a certain sum. He reports that a certain sum would be properly allowed for a wife's alimony, or an infant's maintenance. The Court is resorted to for carrying out the conclusion or opinion.

3. Then again a referee under the Code is sometimes

a mere ministerial clerk to collect testimony or materials for the Court to act upon. A reference to take an affidavit to be used upon a motion in a cause is of this nature. (§ 401.)

As to the practice in these cases the Code itself contains some provisions, and the rules of courts others. Where there is no regulation in either of these, the former practice in the Supreme Court, or in the Court of Chancery, according to the nature of the action or proceeding, is to govern. (Code § 469, Rule Sup. Ct., 97.)

The references directed, or warranted, or recognized by the Code are found in sections 270, 271, 272, 273; in 253 and 254; in 222 and 224; in 246, sub. 2; in sections 287, 296, and 300; and in section 317. In most of these instances some regulations of the Code are found and will govern. We notice that in all (even as to claims laid before a Surrogate) the reference is *in an action pending.*

Lastly, there is a class of cases of references under particular statutes and in special proceedings, in which such statutes largely, if not exclusively, govern the practice. Suits for partition—as to mechanics' liens—and as to incorporated companies—are of this description. We have aimed to ascertain, in connection with each particular case, what part of the practice is affected by the Code, or statutes, or rules, and what is left to be determined by previous regulations or custom. We have not been able to make an

analysis and distribution upon any general principles; and the success of the attempt, even if satisfactory, would be of little practical utility.

It will be useful to notice the sources to which we are to look for guidance in our proceedings and practice, on this subject.

The passage and force of rules established by justices of the Supreme Court is provided for in the Act of 1870, chap. 408, § 13. All rules of the Supreme Court now in force, not inconsistent with the constitution or any statute of the State shall remain in force until abolished or altered by the General Term Justices, the Chief Judges of the Superior Courts of cities, the Chief Judge of the Court of Common Pleas of the City of New York, and of the City Court of Brooklyn in convention assembled, at the capitol in the City of Albany. A convention of such justices and chief judges shall be held at the place aforesaid on the first Wednesday of August, 1870, and every two years thereafter; and such convention shall revise, alter, abolish, and make rules, which shall be binding upon all courts of record as far as they may be applicable to the practice thereof. A quorum is provided for.

The present rules were adopted under this statute on the 24th of November, 1874, to take effect on the 1st of February, 1875. The great mass of those affecting our subject, are rules in force before that time.

By section 469 of the Code, it is provided that the

present rules and practice of the courts in civil actions inconsistent with this act are abrogated, but where consistent with this act they shall continue in force, subject to the power of the respective courts to relax, modify, or alter the same.

The present 97th rule provides: In cases where no provision is made by statute, or by these rules, the proceedings shall be according to the customary practice as it has heretofore existed in the Court of Chancery and Supreme Court, in cases not provided for by statute, or the written rules of the court.

The rules governing our practice and proceedings we judge are these:

1. The Code where by express regulation, or necessary inference, a rule is prescribed.

2. A previous statutory provision upon a subject not definitely governed by the Code, and not inconsistent with any of its enactments.

3. Any statutory subsequent provision altering the rule of the Code, yet not expressly amending it.

4. The rules of the Supreme Court, adopted as prescribed by the statutes of 1870, and consistent with the provisions of the Code or of any statute, and not covered by the Code or another statute.

5. In cases not comprehended within these classes, the written rules of the Courts, in force when the Code was enacted, and not inconsistent with its provisions.

6. And lastly, where all these fail to afford a guide,

the customary practice in the Court of Chancery and Supreme Court.

The following classification of the subjects of a reference, under three titles, has been adopted as the most practical :

Title 1. References to Hear and Determine.

Title 2. Interlocutory References in an Action in Aid of the Court.

Title 3. References in Particular Actions and in other Proceedings.

This arrangement is not so logically perfect as that no matter belonging to one class may not belong to another. The last title may include cases with elements pertinent to one or both of the other two. The subject does not admit of a rigidly distinctive classification. We believe the plan adopted will be found convenient and simple.

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# NOTE.

Since the work went to press, several important changes have been made in the Rules of the Supreme Court, and some valuable cases have been published. These are stated in the Addenda, pages 409–412, with a reference to the pages of the text on which the subject is referred to.

# ERRATA.

Page 27, line 2 from bottom, for "law," read "Court."
" 92, last line, and page 93, first line, strike out "or allowed some objected to by the other party."
Page 197, line 5, for "selecting," read "rejecting."
" 250, line 5, for "proved," read "filed."

# TITLE I.

## REFERENCE TO HEAR AND DETERMINE.

### CHAPTER I.

#### BY CONSENT.

§ 1. To be in Writing and Signed.
§ 2. Order thereupon.
§ 3. Where Infants are Parties.
§ 4. To be at Issue as to all Parties.
§ 5. Issue of Law Referred.
§ 6. Selection of Referee.
§ 7. Number of Referees.

#### SECTION I.

*To be in Writing and Signed.*

All or any of the issues in the action, whether of fact or of law, may be referred upon the written consent of the parties. (Code, § 270.)

The consent should properly not only be in writing, but should be signed by the parties or their attorneys. The consent of the latter is sufficient. (Waterman *vs.* Waterman, 37 Howard, 36.) It should specify the issue or issues referred, unless all are referred, when it may be to hear and determine all the issues in the case. (*Ibid.*)

In this case of Waterman *vs.* Waterman, Justice Parker, after a full examination, held that the following order was a compliance with the section:

"At a Special Term, etc. This action being upon the

Special Term calendar, and called in its regular order, upon the consent of the attorneys of each of the above parties given in open court, it is ordered that this action be, and it is hereby, referred to ——— to hear and determine the same."

This order was drawn up by one of the attorneys, submitted to and approved by the opposite attorney, but without the signature of either, and then entered by the clerk. The action was for a divorce.

The case of the People *vs.* McGinniss, at Special Term, is cited by Justice Parker. The question arose, whether an action for a divorce was referable, and if so, whether there must not be a written subscribed consent to an order. It was held that sections 253 and 270 authorized a reference in such an action, and that it is sufficient if an order is entered with such consent in open court.

SECTION II.

*Order.*

An order on the consent is essential. If it is not made in open court, as in the above cases, when the sitting judge would appear as directing it, the written consent should be laid before a judge at Special Term with an order, and his allowance of the same obtained. Both should then be filed, and the clerk will enter the order. (Scudder *vs.* Snow, 29 Howard, 95; Diddle *vs.* Diddle, 3 Abbott, 170.)

In Scudder *vs.* Snow, *supra*, the parties had agreed to waive a jury trial and refer the cause; but no order was entered. One of the parties failed to appear before the referee, who heard the witnesses on the other side and made a report. The proceeding was held void, and the judgment on the report was set aside.

The order appointing a referee should be entered by the clerk in a book kept under the ninth rule. (Bowner *vs.* McPhail, 31 Barb., 106.) The validity of any proceeding without an order may be questionable. (*Ibid.*)

Where there has been a reference, by written consent, of a case not otherwise referable, the Court, even if it possess the power, ought not to change the referee without consent. There may be an exception if there has been a report reversed for a wrong finding of facts upon testimony. (Billings *vs.* Vanderbeck, 15 Howard, 295.)

But proceeding before a new referee is a waiver of any regularity as to a change of a referee so chosen. (*Ibid.;* and Quin *vs.* Lloyd, 7 Robertson, 157.) If a referee has been agreed upon by consent, a party cannot substitute another in the order. Proceedings before such would be void. (Haner *vs.* Bliss, 7 Howard's Rep., 246.)

## SECTION III.

### *Infants Parties.*

It is presumed that where there is an infant plaintiff, with a guardian *ad litem* appointed under the Code, such guardian may consent to a reference. When there is an infant defendant, even if he may agree to a reference, the consent of the Court to the person to be appointed must be obtained. (See *post*, § 6.) In Edsall *vs.* Vandemark (39 Barbour, 589) the authority to prosecute the action was recognized, although the power to settle was denied. In Tillotson *vs.* Hargrave (3 Maddock's Rep., 498) it was held that an infant was as much bound by the conduct of the solicitor as a plaintiff adult.

SECTION IV.

*At Issue as to all Parties.*

The cause should properly be at issue as to all the defendants before the order is entered. But the objection cannot be taken before the referee that there were necessary parties not served with process. (Hawkins *vs.* Avery, 32 Barbour, 551. And see Goodyear *vs.* Brooks, 2 Roberts, 682.)

SECTION V.

*Issue of Law Referred.*

The Code is express that an issue of law may be referred by consent. When the reference is a general one, issues of law arising upon the pleading may be decided by the referee, and judgment given.

Thus, in Coffin *vs.* Raynold (37 N. Y. R., 640) it was held, that the referee had a right without taking any evidence to dismiss the complaint, on the ground that it did not state facts sufficient to constitute a cause of action.

So in Schuyler *vs.* Smith (51 N. Y. R., 309) the referee decided the case in favor of the plaintiff on the admission of the answer. His decision was affirmed. It was held, that he could render judgment for the plaintiff when the answer does not contain facts constituting a defence.

SECTION VI.

*Selection of Referees.*

The power to refer by consent would seem to involve the power of naming the referee. Such power is ex-

pressly conferred by the 273d section of the Code, but with a restriction, as it was amended in 1866. "In all cases of reference, the parties as to whom issues are joined may agree, in writing, upon a person or persons, not exceeding three, and the reference shall be ordered to him or them, *except when the defendant is an infant or an absentee.*" In such a case the appointment must be by the Court.

I have not found it decided whether the exception is only when a sole defendant is an infant or absentee, or when any one of the defendants is such. It would be most prudent to get the approbation of the Court in the last case as well as in the first.

"And when the parties consent to a reference, but not as to the referee, the Court shall appoint one or more referees, not more than three, who shall be free from exception." (Sec. 273.)

"And no person shall be appointed to whom all parties in the action shall object, except in actions for divorce." (*Ibid.*)

"No judge or justice of any court shall act as referee in any action pending in the court of which he is jndge or justice, unless the parties otherwise stipulate." (*Ibid.*)

## SECTION VII.

### *Number of Referees.*

A sole referee, or more, not to exceed three, may be appointed. (Sec. 273.) It is unusual to have more than one.

In Olmstead *vs.* Loomis (9 N. Y. R., 623), where the questions required skill in mechanical science for their determination, the Court suggested a reference,

and that one of the referees should be a skilled engineer or millwright.

In Morss *vs.* Morss (11 Barbour, 510) it was held that the oath to a witness, although administered by one referee, is the act of the whole, and all must be present.

So, if there are more than one, all must be present at the trial. This was an express provision of the Revised Statutes. (2 R. S., 306.)

So fully is the judicial power vested collectively in all of several referees, that no one of them can be called as a witness in the case. (Morss *vs.* Morss, *ut supra.*)

While the hearing and trial must be in the presence of all, two may concur in a report and it will be valid. This should be upon a consultation of all.

In Townsend *vs.* the Glens Falls Ins. Co. (10 Abbott's N. S., 277) three referees met and heard testimony and argument. Subsequently two of them signed a report, but separately drawn up by the defendant's attorney, dismissing the complaint. A motion to set aside the report was denied at Special Term. The General Term reversed the order and held it void. All the referees must be present at a deliberation upon the case, and as to the report to be made; two may then decide it.

An appeal to the Court of Appeals was dismissed.

For the forms of a consent to refer and order upon it, see Appendix, Nos. 1 and 2.

[We have arranged all the forms and proceedings in an Appendix at the end of the volume, by numbers, referring to the page of the text in which the subject of the form is discussed We have found this a very convenient mode.]

# CHAPTER II.

## COMPULSORY, UNDER SECTION 271, CLAUSE 1.

§ 1. Order on Motion.
§ 2. By Court without Motion.
§ 3. Exception of Questions of Law.
§ 4. Examination of Long Accounts.

"When the parties do not consent, the Court may, upon application of either, or on its own motion, except where the investigation will require the decision of difficult questions of law, direct a reference in the following cases:

"*First.* When the trial of an issue of fact shall require the examination of a long account on either side; in which case the referee may be directed to hear and decide the whole issue, or to report upon any specific question of fact involved therein, or," etc. The other cases specified where a reference may be compelled are stated *post.*

### SECTION I.

### *Order on Motion.*

An order of the Court is necessary. The direction of a judge out of court is not sufficient. Proceedings without such an order are unwarranted and void.

In Scudder *vs.* Snow (29 Howard's Pr. Rep., 95), even where the parties had agreed to waive a jury trial and refer the cause, but no order was entered, a report when one of the parties failed to appear was held void and a judgment on it was set aside.

The application should be by motion at Special

Term for an order. (Rule 47, Scudder *vs.* Snow, 29 Howard, 95.) The notice of eight days is to be served with a copy of the affidavits relied upon, or that it is made upon the pleadings and affidavit. The situation of the action, and that the issues in it, whether of law or fact, have been joined, should be stated.

In Goodyear *vs.* Brooks (4 Robertson, 682) the action was for the foreclosure of a mortgage. There were defendants who had not appeared, and against whom a judgment for any deficiency was sought, and who had not been served with a summons. The order of reference could not be made.

The pleadings may of themselves show that a long account will be involved. The affidavit may then be confined to statements as to the situation of the cause.

Thus in Holmes *vs.* Bennett (28 Howard, 289) the attorney made an affidavit showing the joining of the issue of fact, and the place of trial. This was more proper than one by the party as to such matters.

The pleadings were relied upon to show that a long account would be necessary. They were duly verified, and the Court thought they showed that this was the case. The presumption from the answer was, that the defendant had such an account against the plaintiff.

When the trial of a cause is moved at the circuit, if it appears from the pleadings or facts disclosed that a reference will be necessary, the case may be withdrawn from the jury, but it should be so wholly. (Buchanan *vs.* Cheseborough, 5 Duer, 238.) This was also expressly ruled in Holmes *vs.* Bennett, *supra.*

For the form of an affidavit and order upon it, see Appendix, Nos. 3 and 4.

SECTION II.

The section allows the Court, on its own motion, to order a reference in cases within its provisions. This may be of the whole issues or upon any specific question of fact.

In Van Zandt *vs.* Cobb (10 Howard, 348) the case had been submitted at Special Term upon the complaint, answer, and reply, with points. The pleadings showed a right to an account; but before the account ing could be had there were material questions of fact to be settled by testimony—material to the accounting. A reference was ordered by the Court to take the proofs and find the facts upon the several issues presented by the pleadings, and then upon the facts so found and the pleadings, to state the account.

The General Term may, on an appeal, make an order of reference. In Forrest *vs.* Forrest (6 Duer, 104, and 25 N. Y. R., 501) the judge who tried the issues in an action for adultery put a question to the jury as to a proper amount for alimony. The amount found was inserted in the judgment had at Special Term. The General Term reversed it as to this point, approving it as to the dissolution. It then directed a reference to ascertain a proper sum to be allowed for alimony. The report was confirmed at Special Term, and a further judgment or order was entered for payment of the amount. This was affirmed at General Term. In the Court of Appeals, the power of the General Term to make the order of reference was recognized.

Although this was not a case of a reference to hear and determine, we presume there can be no valid distinction as to the power of the Court at General Term to make such an order.

## SECTION III.

### *Exception.—Questions of Law.*

A restriction upon the power of the Court to order a reference is, where the investigation will require the decision of difficult questions of law.

This was a well settled rule of the courts under the revised statutes. (Barber *vs.* Cromwell, 10 Howard, 351.)

The Code does not, in terms or by implication, require that the moving party should show by affidavit that the case is not within the exceptions. The particular points of law should be stated so that the Court can determine their nature. All that the affidavit of the moving party need show is, that the cause is a referable one, and leave it to the opposing party to show that the case is within the exception. (Barber *vs.* Cromwell, *ut supra.*)

The opposing affidavit should state the points of law which will arise, that the Court may examine them so as to be satisfied that they are questions of real difficulty. (Dewey *vs.* Field, 13 Howard, 437.)

The difficult questions of law intended by the section are not merely those arising upon the facts as presented by the issues in the case, but include questions growing out of the character of the issues, such as questions of evidence on an issue of fraud.

In Goodyear *vs.* Brooks (4 Robert, 682; 2 Abbott's Pr. Rep. N. S., 296) an order had been obtained at Special Term, on notice, for a reference to hear and determine. On appeal, it was held that the questions of law which might require to be decided were not confined to those arising out of the pleadings presented by the issues; they might grow out of their very

character and the evidence necessary to their investigation.

The action was to foreclose chattel mortgages, and the defense was that they were fraudulent. Held that the necessity of proving good faith and honest intent would probably raise difficult questions of law. The action was not in a condition to have all the issues referred, while defendants, against whom judgment for a deficiency was sought, had not been served.

## SECTION IV.

### *Examination of Long Account.*

The whole case may be referred to hear and determine it "when the trial of an issue of fact shall require the examination of a long account on either side." In which case the referees may be directed to hear and decide the whole issues, or to report upon any specific question of fact involved therein.

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The power to refer an action involving a long account is intended more for the convenience of the Court than as conferring a right on the parties. (Goodyear *vs.* Brooks, 2 Abbott's Pr. Rep. N. S., 296.) There is no absolute right to a reference, merely because a long account is involved. (Wheeler *vs.* Falconer, 7 Robertson's Rep., 45.)

Whenever it appears that the trial of any one of the issues will involve a long account, the reference may be ordered, although the determination of some other issue may render it unnecessary to try the first issue at all.

In Wittaker *vs.* Desfosses (7 Bosworth's Rep., 678) five judges of the Court at General Term decided, that it is sufficient if it appear that the trial of any one of the issues will involve the examination of a long account, although the determination of some other issue may make the trial of this needless. For example, one on an allegation of a fraudulent settlement of accounts, and another as to the state of accounts if fraudulently settled. Whether, in case of this description, the whole of the issues should be referred, or the taking of the account only ; and whether the account shall be taken before the trial of the other issues or after, is in the discretion of the Court, to be governed by the particular circumstances of each case. Sometimes evidence of the actual state of the accounts may tend to establish the fraud alleged in procuring the settlement.

It should appear that the trial of some or one of the issues will require such examination. Unless that appear, there is no power to order a reference of the action for trial.

If, however, there is any evidence laid before the Court at Special Term that such an examination will be required, and that evidence is uncontradicted, or if there is a conflict of proof created by counter affidavits, then the determination at Special Term must be held conclusive.

So in Bachelor *vs.* the Albany City Insurance Co. (6 Abbott's Rep. N. S., 240), also in the Superior Court, the judges at General Term reaffirmed the rules declared in Whittaker *vs.* Desfosses. The motion was upon a policy of insurance. The particulars of the loss furnished to the company consisted of one hundred and forty-five items of goods consumed, of the aggregate value of $11,127, and of forty-nine items of goods saved, but damaged to the extent of $263. The judge at Spe-

cial Term decided that the examination of a long account was required, and that no difficult questions of law arose. The order of reference was affirmed.

The case of Townsend *vs.* Hendrich (40 Howard, 143) is hereafter fully stated *post*, Ch. III. [3.] It is sufficient here to notice, that the action was for a recovery of securities and moneys delivered, upon false and fraudulent representations. That, although the answer raised an issue which required the examination of a long account, the complaint was to decide the character of the action, and *that* showed it was not referable.

In Godfrey *vs.* The Williamsburgh Insurance Co. (12 Abbott, R. S., 250) Monell, Justice, examined the case of Townsend *vs.* Hendricks, and held that it did not contradict the several cases decided in the Superior and Supreme Court, as to ordering references in actions on insurance policies. Where no question of fraud was involved, but only the amount of damages, a reference could be ordered.

This was not, however, a matter of right. When the cause could be tried by the Court in a reasonable time the greater delay and expense of a reference should be avoided. The order was in this case refused.

In Kain *vs.* Delano (11 Abbott, N. S., 29), in the Court of Appeals, it was declared, that a compulsory reference of an action as involving a long account, could only be ordered where the accounts to be examined are the immediate objects of the suit, or the ground of defence. They must be directly and not incidentally or collaterally involved.

The order in this case had been granted on the pleadings and affidavit, stating generally that the trial would require the examination of a long account, but without stating how or why. In the defendant's affidavit

this was fully and circumstantially denied. The pleadings showed that the claim was on a written contract, and for a single and specified sum of money.

The Court of Appeals held that such an order, in such a case, affected a substantial right, and could be reviewed in that court. That the evidence did not show that such an account was involved. The moving papers should show that an account is necessarily involved. A general allegation of the fact is insufficient.

In Wells *vs.* Darragh (52 N. Y. Rep., 590) there was an appeal to the Court of Appeals from an order of the General Term, affirming an order of reference. The action was on a contract for the sale and delivery of merchandise. The answer and affidavits set up fraud and deceit in the quality of the articles sold, and breach of warranty as to them. There was a counter claim as to similar deceits in respect to other articles bought, besides those in the complaint.

The Court held that the action was clearly on contract. Its character was determined by the complaint. The answer could not change it. The right to prove fraud in the transaction, and claim damages by way of recoupment, could not alter this.

The objection that the case did not involve the examination of a long account was not available in the case. It is only when it is palpable that no such account can be involved that an appeal will lie to this Court. (Citing Kain *vs.* Delano, *supra.*)

We may add to these authorities the two following cases:

In Ross *vs.* The Mayor (32 Howard, 164) the action was for damages to property destroyed by a mob. The complaint set forth a large number of items injured or destroyed; and, on a motion for a reference,

it was contended that such a large number of items constituted a long account. The Court referred to the former rule that actions for torts could not be referred, and held, that under the Code the rule was the same.

In Sharpe *vs.* The Mayor, etc. (9 Abbott, 426), the Court declared that compulsory references should be rigorously confined to cases involving the examination of a *bona fide* account in an action on contract. That in Ross *vs.* The Mayor (*supra*) this was recognized as the true rule.

## CHAPTER III.

### UNDER SECTIONS 253 AND 254 OF THE CODE.

§ 1. No Compulsory Order of Issue of Law.
§ 2. Three Cases specified in Section 253.
§ 3. Under Section 254.

1. "An issue of law must be tried by the Court unless it be referred as provided in sections 270 and 271."

2. "An issue of fact in an action for the recovery of money only, or of specific real or personal property, or for a divorce from the marriage contract on the ground of adultery, must be tried by a jury, unless a jury trial be waived, as provided in section 266, or a reference be ordered, as provided in sections 270 and 271." (Code, § 253.)

3. "Every other issue is triable by the Court, which, however, may order the whole issue on any specific question of fact involved therein to be tried by a jury, or may refer it as provided in sections 270 and 271." (Code, § 254.)

### SECTION I.

Section 270 authorizes all the issues, whether of fact or law, to be referred upon a written consent. But it is presumed that under section 271 there can in no case be a reference of a mere issue of law by compulsory order. The first clause allows it only where the trial of an issue *of fact* involves a long account.

It seems that the only case in which an issue of law can be referred, except by consent, is where the issue of fact involves such an account. Then every

issue may be referred. Even then the nature of the action must be considered. The destruction of property by a mob, might actually involve a long account of items and their value, as well as a legal question of liability of the parties sued. Yet it could not be referred.

## SECTION II.

Three cases are specified in which a trial by jury must take place, unless waived under section 266, or referred by order under 270 and 271. These cases are an issue of fact in an action for the recovery of money only, or of specific real or personal property, or divorce for adultery.

In each of these cases, the trial by jury may be waived, and a reference had by consent.

The mode of waiver is prescribed by section 266 as follows:

Trial by jury may be waived by the several parties to an issue of fact in actions on contract, and, with the assent of the Court, in other actions in the manner following:

1. By failing to appear at the trial.

2. By written consent, in person, or by attorney, filed with the clerk.

3. By oral consent in open court, entered in the minutes.

In the first place, we apprehend that in the three actions under section 253 there must first be a waiver in one of the modes designated; and then an order of reference entered by written consent of the parties or attorneys under section 270.

Although it has been held that a party may by his act waive a constitutional or statutory right, it is sub-

mitted that it might be a serious question whether when the statute has prescribed the modes of waiver, it is not exclusive. (See Greason *vs.* Kettletas, 17 N. Y., 471; and Deburold *vs.* Drake, 46 N. Y., 318.)

In Fasnacht *vs.* Stehn (53 Barbour's Rep., 650) the action was upon a foreign judgment. The answer set up what amounted to a plea of *nul tiel record.* It was held that this was an issue of fact, and as such should be tried by a jury. The defendant had appeared on the trial, and excepted to the findings of fact and conclusion of law of the judge. It was held on appeal that he had not waived his right to a jury, and the trial was irregular.

The following was decided to be an action for the recovery of money only.

The complaint set out an agreement to insure, and to deliver a policy. A loss occurred before this was done. It was held that it was not necessary to compel a delivery of the policy before suit. An action upon the agreement and loss would lie, and it was one for the recovery of money only, and should be tried by a jury.

The case of Bradley *vs.* Aldrich (40 N. Y. Rep., 504) is important upon this point. The complaint stated an agreement for an exchange of property, carried into execution. It set forth that the same was obtained by false representations and concealment. It prayed a judgment to that effect, and a reconveyance of the property transferred by the plaintiff, he surrendering what he had received. The Court, at Special Term, found that the plaintiff had failed as to everything, except as to one particular, viz., that a note of a party assigned in the transaction was good. A reference was ordered to ascertain the damages sustained on that account. A report was made, and judgment entered upon the same for the amount found due. On appeal

the General Term reversed the judgment, and dismissed the complaint, without prejudice to the bringing an action at law. It considered the evidence to be insufficient.

In the Court of Appeals, a reference was made to the change of the 268th Section of the Code, that a judgment on a trial by the Court shall not be deemed by the Court of Appeals to have been reversed upon questions of fact unless so stated in the judgment of reversal. This, then, must be assumed, notwithstanding the opinion of the General Term expressed the contrary.

It was clear that the action as begun and carried on was one for equitable relief, and that only, viz., the rescision of the contract and restoration of the parties to their former situation. This had ended in an action on the case for a deceit, and an award of damages, which was an action for the recovery of money only.

The case of Barlow *vs.* Scott (24 N. Y. Rep., 40) was distinguished. There, on the face of the complaint itself, there was no ground for a specific performance, and it had prayed compensation in damages in the alternative.

The conclusion was, that the defendant had a right to a trial by jury of the questions upon which the judge at Special Term gave judgment against him.

It was unanimously agreed that causes of action, both legal and equitable, arising out of the same transaction may be united by proper allegations in the complaint. (Citing Mann *vs.* Fairchild, 2 Keyes, 111.)

In Lewis *vs.* Varnum (12 Abbott, 305) the action was for damages for the conversion of personal property. It was held that it must be tried by a jury, unless such trial was waived.

In Genet *vs.* Newland (45 Barbour, 560) one of the causes alleged was for the improper sale of property

pledged and damages on account. Another was to redeem the pledge. The plaintiff failed at a trial before a judge to establish the last or equitable claim. The Court ordered that the first issue for the tort in selling should be tried by a jury.

The Court may, when it finds the cause has been improperly treated as an equity case, deny such relief, and direct a trial of the case as an action at law before a jury.

In Diddell *vs.* Diddell (3 Abb. Pr. R., 167) the action was for a divorce on the ground of the adultery of the wife. The answer set up cruel and inhuman treatment by the plaintiff as a ground of defence, and sought a judgment for separation and alimony. This part of the answer was stricken out. It was not connected with or arising out of the subject of the action.

An agreement in writing was entered into between the respective attorneys, waiving a jury trial, and referring the cause to be heard and determined. The consent was not filed with the clerk, but an order was entered reciting a stipulation, but making the reference one to take testimony and report. Both parties attended and examined and cross-examined witnesses.

The proceedings were set aside as wholly irregular. There should have been a written consent waiving a jury trial, signed by the attorneys and filed with the clerk, and also a written consent so signed to refer the cause.

The stipulation was then filed, and an order made *nunc pro tunc*, to hear and determine the whole issue.

## SECTION III.

### *Under* § 254.

Section 254 provides "that every other issue (other than in the three specified actions in section 253) is triable by the Court, which may order the whole issue or any specific question to be tried by a jury, or may refer it as provided in sections 270 and 271."

The power to refer is thus controlled by those sections; that is, under this 254th section, while the Court may try every other action, or may take the verdict of a jury upon every or any question in it, it can only refer when there is a consent under section 270, or the case is within the provisions of section 271.

We may here usefully state the case of Townsend *vs.* Hendrich (40 How. Rep., 163) more fully. The case was one of a claim for two railroad bonds and several sums of money, which the plaintiff was induced to part with and to pay the defendants, by reason of their false and fraudulent representations. The answer denied all the allegations of this nature. It set forth the particulars of the transaction and contract between the parties as to a purchase of copper; and by way of counter claim demanded a balance due. The Court at Special Term ordered a reference to hear and determine, against the opposition of the defendant. This order was affirmed at General Term (39 Howard, 475).

An appeal was taken to the Court of Appeals, where a motion to dismiss it was brought on at the same time.

On the motion, it was held that under subdivision 4 of section 11, as amended in 1870, an appeal would lie

where an order affected a substantial right, not involving any question of discretion arising upon an interlocutory proceeding, or any question of practice.

And upon the main question it was ruled that the courts had no power compulsorily to refer an action which is not founded on contract, and which does not involve the examination of a long account.

The action sounded in tort, and could not be referred, although the answer set up a counter-claim, the issue raised by the reply to which, could involve the examination of a long account. Should the counter-claim ever require examination a reference could be ordered after the trial of the issues.

# CHAPTER IV.

## MODE OF TRIAL AND POWERS OF REFEREE.

§ 1. Swearing Referee.
§ 2. Notice of Trial.
§ 3. Adjournments.
§ 4. Amendments.
§ 5. Power to Preserve Order.
§ 6. To Administer Oaths.
§ 7. Witnesses.
§ 8. Examination of Parties.
§ 9. Production of Books, etc.
§ 10. Dismissal of Complaint.
§ 11. Report—(*a*) Time of Making, (*b*) Delivery, (*c*) Power over when Lost.
§ 12. Findings.
§ 13. Decision and Judgment.
§ 14. Power as to Costs.
§ 15. Review-Exceptions Case.
§ 16. Death of Referee or Party.
§ 17. Fees of Referee.
§ 18. Power of Court other than on Appeal.
§ 19. Reference on Order for a New Trial.

### SECTION I.

### *Swearing Referee.*

By the Revised Statute (2 R. S., 384, § 45) where references were ordered under its provisions, the referees before proceeding were to be sworn faithfully to hear and examine the cause, and to make a just and true report according to the best of their understanding. Such oath could be administered by any one authorized to take affidavits in the court in which the suit is pending, or by a justice of the peace.

It may be doubted whether this provision applies to

any reference under the Code, particularly to a reference to hear and determine.

At any rate it is very generally disregarded in practice. If the parties proceed upon the reference, they are held to have waived any right to object to the omission.

In the People *vs.* Connor (46 Barbour, 333), where a statute as to laying out a highway required the referees to be sworn, it was held that an implied waiver by proceeding could not be sustained. The parties had a right to suppose the referees did their duty, and had no notice of the omission. Besides, the whole town had an interest in the highway. But the cases of Howard *vs.* Sexton (1 Denio, 440) and Reuter *vs.* The Ulster R. R. Co. (7 Howard Pr. Rep., 41) were recognized as law. The parties in civil actions can impliedly waive the oath.

SECTION II.

*How Conducted—Notice.*

"A trial by referees shall be conducted in the same manner and on similar notice as a trial by the Court." (Code, § 272.)

The course of the proceedings, as far as it is within the power of the Court at a trial, is within the discretion of the referee. The order of proof, as to leading questions and recalling a witness, are examples.

In Palmer *vs.* Palmer (13 Howard, 363), it was ruled, that where a reference in a partnership suit was ordered of the whole cause the referee might determine the liability first, and if he found such liability, proceed to take the account.

The time of a notice of trial is fixed by section 256 at fourteen days, and it may be given by either party.

In Williams *vs.* Sage (Code Rep., R. S., 388) Judge

Allen stated that both plaintiffs and defendants, in all actions under the Code, are actors, and each has the right to notice the cause for trial, either in court or before referees. By the Code, either party may notice an issue for trial (Sec. 256). This is the only authority for either party to notice an action for trial before a referee; and if under it the plaintiff has a right to notice, the defendant has the same right. The words "before the Court," when applied to actions pending before a referee, should be held to mean before the day named in the notice or designated by the referee for the trial.

The course of having a day appointed by the referee in writing, and a copy served with the notice of trial, was approved in Sage *vs.* Mosher (17 Howard, 367). The ordinary practice is to ascertain what day will suit the referee, and merely give the notice of fourteen days, unless the attorneys agree upon a shorter time, which is convenient for all.

The place of trial need not be in the county named in the complaint as the venue. (Wheeler *vs.* Maitland, 13 Howard, 35.) The order may give the referee liberty to meet in another county for convenience of witnesses. (Pierce *vs.* Voorhees, 3 Howard, 111.) But the place of trial as to jurisdiction is not changed.

The personal presence of the referee is necessary. He cannot delegate to another the authority to proceed. But the parties may waive the objection, and will do so by going on with the case before him. (Metcalf *vs.* Baker, 11 Abbott, N. S., 431.)

It is not an objection to proceeding upon a reference that certain parties have not been served with process, or were not in court. The objection should have been taken on the motion to refer. (Hawkins *vs.* Avery, 32 Barbour, 551.)

It is presumed that the 37th rule of the Supreme Court is applicable to the trial by a referee. It relates to the mode of examining and cross-examining, the manner of taking the testimony, and summing up.

## SECTION III.

### *Adjournments.*

The referee has the same power to grant adjournments as the Court, upon the same terms and with the like effect. (Code, § 272.)

Where an application shall be made to a Court or referee to postpone a trial, the payment to the adverse party of a sum not exceeding ten dollars, besides the fees of witnesses, may be imposed as the condition of granting the postponement. (Code, § 314.)

In Gamble *vs.* Taylor (43 Howard, 375), the case being postponed on condition of payment of costs and witnesses' fees, it was ruled that the plaintiff could have insisted upon proceeding at the trial on the omission to pay the amount. But the defendant, having taken the benefit of the postponement, was bound to perform the condition. Such had been the settled rule for many years. The party may waive the right to proceed, and the Court on motion will compel payment. The course is by a precept in the nature of a *fieri facias.* (Laws of 1840, p. 333, § 15; Laws of 1847, ch. 390; 6 Howard, 121.) Such costs, if not collected, may be included in the general bill, if the party to whom they are allowed succeed in the action.

The referee should himself judge of the sufficiency of the grounds urged for a postponement. The Court should not be applied to. In Langley *vs.* Hickman (1 Sandf., Superior Court Rep., 681), where the case was before referees, the Court refuses to interfere by order.

The propriety of an adjournment to give a party time to procure testimony, or because of the absence of a witness is peculiarly within the province of the referees.

A referee may adjourn on his own motion. (*Ex parte* Rutter, 3 Hill., 467.) "Of course, when this is against the will of the parties, or either of them, the reasons should be strong to justify it."

The grounds for an adjournment are generally the absence of a witness not sufficiently accounted for, or when wilfully absent, to enable the party to attach him. (Langley *vs.* Hickman, 1 Sandf., Sup. Court Rep., 681; Suydam *vs.* Stewart, 20 John, 476.)

In Billings *vs.* Vanderbeck (15 Howard's Pr. Rep., 295) the referee adjourned a cause to enable the defendant to give the requisite notice for the examination of himself as a witness. The action of the plaintiff's attorney had prevented its being duly given. This was when the Code required a certain number of days' notice.

The engagement of counsel in court is a very frequent ground of adjournment, and is, perhaps, the chief cause of the delay in a referee's office. There seems to be no good reason why the Courts (except upon a jury trial) should not treat an engagement in a referee's office as sufficient ground for postponing a case. The convenience and rights of parties and witnesses would be duly consulted.

## SECTION IV.

### *Amendments.*

Referees shall have the same power to allow amendments to any pleadings and to the summons as the law upon the trial, upon the same terms and with the like effect. (Code, § 272.)

This power is co-extensive with that of the Court when trying a cause. No amendment can be allowed by the referee which could not be by the Court at the trial.

In Hoyt *vs.* Hoyt (8 Bosworth, 511) the allegation of the complaint was, that an assignment of bonds and mortgages in question was in writing, and as security for *a certain sum* due upon a purchase of lots. An amendment was allowed by a referee, by adding a statement that the bonds and mortgages were afterwards assigned by parol as "*collateral security for all the indebtedness of the said C. H.*," the assignor. The Court sustained this decision. It considered the case of the Union Bank *vs.* Mott (19 Howard, 267) as not controlling.

This case of the Union Bank *vs.* Mott is important upon the point. The complaint sought to charge the defendant with moneys fraudulently obtained, between the 1st of January 1849, and the 10th of March 1853, by means of over-drafts, etc., in collusion with a bookkeeper of the plaintiffs. The cause was referred by consent, and the evidence taken before the referee covered the whole period stated in the complaint. But it appeared that the plaintiffs were only incorporated and began business in December, 1852. There was a bank with a similiar name existing from 1811, which ceased in December, 1852, and the present plaintiffs were its assignees of all the claims against the defendant arising before that date, except about $1,000.

The referee granted a motion to amend the complaint by setting forth a claim as assignee for all the demands arising before December, 1852. The Special Term, on motion, set aside his order, with liberty to apply to the Court for leave to amend. (18 Howard, 506.) The Court, in May, 1860, granted an order to amend on certain conditions. (19 Howard, 114.) An

appeal was taken to the General Term. (*Ibid*, 268.) It was decided:

"That the Court concurred with Judge Allen in holding that the referee had no power to allow the amendment. It was not a case of variance, and not such as should be allowed on a trial; but the Court could undoubtedly permit it on proper terms and notice.

"That the defendants had a right to have such amended complaint served upon them, and to demur or answer thereto. This they had been deprived of by the order at Special Term, and it was depriving them of a substantial right.

"The provision of the order, that the testimony before taken be adopted under the amended complaint, was also erroneous." The order of the Special Term was modified as to these conditions, and the rest of it affirmed, but upon payment of a trial fee and disbursements.

But there is a class of cases in which distinctions have been taken, and the power of the referee sustained. Where the alterations proposed are material to the case already made, not merely to another and wholly different case, the referee may allow the proposed amendment.

For example, in Dunigan *vs.* Crummey (44 Barbour, 528) the defendant, at the close of the trial, moved for a nonsuit, on the ground that the contract in question was not in writing, nor any part payment made on delivery. The amendment allowed was a statement that part of the machine had been delivered and accepted, and the rest of it offered and refused. This was not introducing a new distinct cause of action.

In Secor *vs.* Law (9 Bosworth, 163; 3 Keyes, 525) the amendment was allowed by a referee after the case

was closed and submitted. The substance of the amendment was already in issue, being contained in the original reply to the defendant's defence or set off of a claim for damages. What was already in the complaint was necessarily part of the amendment, and the only effect and object of the amendment was to get rid of a technical objection of want of parties.

The defendant also, by amending his answer, waived any objection.

In Woodruff *vs.* Hurson (32 Barbour's Rep., 557), in an action to foreclose a mortgage, the defendant had alleged in his answer a payment of $800, which was admitted. On the trial he offered in evidence three notes of the plaintiff to reduce the amount. A motion to amend the answer was denied, and the referee excluded the evidence as unwarranted by the answer. The Court at General Term held that he was right. It would have changed the defence. The referee had not jurisdiction.

A bill of particulars may be amended. In Melvin *vs.* Wood (3 Abbott, Court of Appeals Decisions, 272), in an action for goods sold, moneys advanced, etc., a bill of particulars was annexed to the complaint. The referee allowed the plaintiff to substitute a new bill in the suit. The Court held that such an amendment was fully authorized by the Code.

In the same case the defendant on the trial had moved to amend his answer so as to conform to the testimony.

But we understand that the amendment of the Bill of Particulars was proper, independently of this circumstance.

In Everett *vs.* Vandryce (19 N. Y. Rep., 439) Justice Gray and some others were of opinion that an amendment of an answer, which sought to introduce a

wholly new defence in no way suggested by the original answer could not be made.

In Woodruff *vs.* Richie (31 Howard, 164), at General Term Superior Court, the subject was fully examined. The amendments must be by allegations material to the case. That case arises upon the facts stated in the pleadings as constituting the cause of action or defence. The insertion of facts of a new character would be a substituted pleading, not an amendment of an existing one.

It has been decided at Special Term, after an elaborate examination, that a referee has no power to amend a complaint by striking out the name of one of the defendants. An order of the referee to that effect was set aside on motion. (Billings *vs.* Baker, 6 Abbott, Pr. Rep., 214.)

In Davis *vs.* The Mayor of New York (14 N. York Rep., 506) it was held that a suit would not lie at the instance of a resident and tax-payer of the city of New York, to prevent the construction of a railway in a street on which he did not reside, he not being specially injured. On the trial and this conclusion, the Court allowed an amendment by introducing the Attorney-General as a party plaintiff. The case was again brought on and judgment given against the defendants.

It was held in the Court of Appeals that the introduction of the Attorney-General was erroneous, and affected a substantial right of having the cause dismissed, from the inability of the existing plaintiffs to sustain it.

In Rochester *vs.* Isaacs, Superior Court, Special Term, Sept., 1873, the subject was carefully examined and the judge held that the decision of Justice James in Ford *vs.* Ford (35 Howard, 322) was correct, namely:

That on a trial, neither the referee nor the Court has power to allow an amendment by inserting a new cause of action or a new defence. Such amendment might be obtained by suspending the trial, and applying to the Court at Special Term. The doctrine of Woodruff *vs.* Dickie (5 Robt., 619) appeared to be overruled.

And in the late case of Sinclair *vs.* Neil (Supreme Court Rep., Vol. 8, p. 81 Huns Reports) the Court denied the power of a referee to allow an amendment which constituted an independent right of action not within the issues referred to the referee to try. The mode was by special motion, the trial being suspended.

SECTION V.

*To Preserve Order.*

The referees shall have the same power to preserve order and punish all violations thereof upon such trial as is possessed by the Court *upon a trial.* (Code, § 272.)

This power is given only in cases where the referee is to hear and determine the same upon a trial. In Bennett *vs.* Phalen (19 Howard, 530) it was considered that the general authority over witnesses conferred in the same section was so restricted.

In Heerdt *vs.* Wetmore (2 Roberts' Superior Court Rep., 697) it was held, that while the Court retains its power concurrently with a referee to punish for a contempt, it would be at least useful that he first pass upon the question, even if he report the facts and conclusions to the Court that the attachment may issue from it.

The power continues in the Court notwithstanding

it may be exercised by the referee to punish for such a violation of order. (Byas *vs.* Smith, 4 Bosworth, 679.)

So in Seely *vs.* Jobson (6 Abbott's Rep., 217, Note) the offence was an assault committed during a trial before a referee. He adjourned the case and reported to the Court. An order was made to show cause why the defendants should not be punished for a contempt. A reference was directed by consent to ascertain the facts. The report found them, and that the defendants were guilty of a contempt.

On motion to send the matter back to the referee before whom the offence was committed, the Court refused it, and decided the matter upon the facts reported. Justice Sutherland stated, that his associates concurred that the Court had jurisdiction of the matter. The parties were committed.

## SECTION VI.

### *To Administer Oaths.*

Every referee appointed pursuant to this act shall have power to administer oaths in any proceeding before him, and shall have generally the powers now vested in a referee by law. (Code, § 421.) If there is more than one referee, either of them may administer the oath (2 R. S., 484, § 46); but this must be in the presence of all. (Morse *vs.* Morse, 11 Barbour's Rep., 510.)

It has been decided that the power to administer oaths depends upon there having been an order duly entered for the appointment of the referee. Otherwise an oath administered would be extra-judicial. (Bonner *vs.* McPhalen, 31 Barb. Rep., 106.)

The referee may not receive affidavits in lieu of an examination of witnesses in his presence, and upon

oath administered by himself. (The Security Ins. Co. *vs.* Martin, 15 Abbott Rep., 479.)

The power involves the right to administer the oath in any form which is allowed by law, and in conformity with the religious faith of the witness.

The ordinary form is, the hand being upon the Gospel: "The evidence you shall give in this case, wherein ——— is plaintiff and ——— defendant, shall be the truth, the whole truth, and nothing but the truth, so help you God." The book is then kissed.

A person desiring it may swear in the following form: "You do swear in the presence of the ever living God that the evidence," etc., as above. Such person may or may not hold up his hand in his discretion. (2 R. S., 407, § 103.)

For one who has conscientious scruples as to taking an oath, it is: "You do solemnly, sincerely, and truly declare and affirm that the evidence," etc.

A Jew is sworn upon the Pentateuch. (1 Vernon, 265; *Tacto Libro Legis Mosaicæ*, 1 Atkyns, 41.)

Any person believing in any other than the Christian religion shall be sworn according to the peculiar ceremonies of his religion, if there be any such ceremonies, instead of any of the modes herein before prescribed. (2 R. S., 408, § 106.)

## SECTION VII.

### *As to Witnesses.*

They shall have the same power to compel the attendance of witnesses before them by attachment, and to punish them as for a contempt for non-attendance or refusal to be sworn or testify, as is possessed by the Court. (Code, § 272.)

The provisions of the revised statutes (2 R. S., 384, Sec. 45) are similar. Witnesses are brought before a referee by the usual process of *subpœna*, and in no other mode.

The above powers are conferred upon a referee when he is acting as a judge to hear and determine the cause. (Burnett *vs.* Phalon, 19 Howard, 530.) As long ago as the time of Lord Hardwick, a witness could only be brought before a Master by *subpœna ad testificandum.* (Dickens, 334.) The power is distinctly conferred upon the referee to compel attendance by attachment. No application to the Court is necessary. Upon the usual affidavit of the service of a *subpœna* being laid before him, he signs the warrant of attachment, as referee, commanding the sheriff to bring the party before him at his office, designating it.

In Heerdt *vs.* Wetmore (2 Roberts, 697) the power of a referee to adjudge as to a contempt of a witness refusing to answer, or to produce papers called for, was recognized. Admitting that the Court retained a concurrent authority (11 Abbott, 163; 4 Bosworth, 657), yet the referee should first pass upon the question, even if he reports the facts and his conclusions to the Court, in order that an attachment might be applied for there.

In the case of Van Ingen *vs.* Whitman, 1873, a witness before a referee was questioned as to a statement made under oath respecting the capital of a special partner put into the firm. The object was to show a contradiction between such statement, and the affidavit made by him on the formation of the firm. He objected to answering until he could consult his counsel whether he was not protected from doing so. The referee gave him an opportunity. He subsequently appeared and stated that he objected to answer the question, because, as he was advised, the answer might subject

him to a criminal proceeding. The question was reduced to writing upon the referee's minutes, and also the answer. This was equivalent to the demurrer of a witness under the old practice.

The referee held that the objection could not be sustained, as the time for any criminal proceeding had expired. (See Hoffman's Ch. Pr., vol 1., p. 465; Masters in Chancery, 60.) The referee entered the following on his minutes:

(TITLE.) (DATE.)

G. M. W. having been duly called and sworn as a witness on behalf of the plaintiff herein, the following question was put to him: "In what," etc., and thereupon the said witness refused to answer the same on the ground that he might be subjected to criminal proceedings by reason of an affidavit made by him on the ——— day of ———, 1869, upon the formation of the special partnership in question in this cause, and I hereby adjudge the said G. M. W. to be in contempt for not answering the question aforesaid, and that an attachment issue against him.

M. H., Referee.

The witness subsequently withdrew his objection and was examined.

In Taylor *vs.* Wood (2 Ed. Ch. Rep., 94) the Vice-Chancellor held that if a question is put tending to criminate a witness, or subject him to penalties, the examiner might apprise him of his legal rights. That he might consult counsel, and even the counsel of the adverse party, as to his right to object. He also held that the counsel of the opposite party had no right to interrupt the examination by giving advice unasked for by the witness. (See, also, Heerdt *vs.* Wetmore, 2 Robertson, 691, to this point.)

In Stewart *vs.* Turner (3 Edw. Ch. R., 458), the Vice-Chancellor repeated the rules he had stated in the former case in substance.

It is not within the scope of this work to enter upon the extensive subject of the rules of evidence, the competency of witnesses, or the conducting of their examination, which are the same as upon the trial by the Court, and which a referee is presumed to know. But we except two cases of changes made by the Code, and of great importance.

By section 398, no person offered as a witness in any action or proceeding in any Court, or before any officer acting judicially, shall be excluded by reason of his interest in the event of the action or proceeding, or because he is a party thereto, except as provided in the next following section of this act."

"Nothing contained in the eighth section of this act shall be held or construed to affect or limit the operation of this or the "next following section."

The eighth section regulates actions commenced after the 1st of July, 1848, by the Code.

The 399th section is: "No party to an action or proceeding, nor any person interested in the event thereof, nor any person from, through, or under whom any such party or interested person derives any interest or title, by assignment or otherwise, shall be examined as a witness in regard to any personal transaction or communication between such witness and a person at the time of such examination deceased, insane or lunatic, against the executor, administrator, heir-at-law, next of kin, assignee, legatee, devisee, or survivor of such deceased person, or the assignee or committee of such insane person or lunatic."

"But this prohibition shall not extend to any transaction or communication as to which any such execu-

tor, administrator, heir-at-law, next of kin, assignee, legatee, devisee, survivor, or committee shall be examined on his own behalf, or as to which the testimony of such deceased person or lunatic shall be given in evidence."

We have thus a comprehensive rule established, that, unless there is an exception under the 399th section, a party interested in the event, and a party to the action, though interested, may be examined as a witness. He is treated as a witness exactly as if he were not interested and not a party. The excepted cases are to be considered. They restrict the general competency.

The witness may not depose as to any personal transaction or communication between himself and a deceased party, or with an insane person, or lunatic, against any representative of such party or person specified.

In Dyer *vs.* Dyer (48 Barb. Rep., 189), the Court say: The provision was designed to prevent a party from testifying as to any transaction where the other party had no opportunity to be sworn, and to give his version of the matter. It excluded a party from testifying that a transaction sworn to by others as having taken place, did not take place. Evidence that no such transaction as alleged took place is evidence in regard to a personal transaction.

The section was not intended to apply to testimony resting in papers or documents. It applies to cases of personal intercourse, conversations, or communications had personally with the deceased. The plaintiff in an action against executors could prove the contents of a lost letter. (Williston *vs.* Williston, 41 Barbour, 635.) So conversations between the deceased and a third party, overheard by the witness, may be proven by

him. (Simmons *vs.* Sisson, 26 N. Y., Rep., 264; 6 Lansing, 502.)

In Hatch *vs.* Penguet (64 Barb., 189) it was declared that the language, *personal transactions*, did not merely refer to those which took place between the parties in the absence of other persons, but it related to the nature of the transaction. There the plaintiff was a daughter of the testatrix, and the question was as to the competency of the testatrix, and of undue influence used by the defendant Penguet, executrix and legatee. The plaintiff testified as to transactions and conversations between herself and the deceased, but which took place in the presence of the defendant. The Court declared that this made no difference. The word *personal* did not mean *private.*

In Strong *vs.* Dean (55 Barbour, 337), a claim against executors on a note of the testator was referred. Indorsements of interest were upon it. A document equivalent to a release of all demand on any notes of the deceased was produced. The plaintiff was examined to show the release was only applicable to other notes given by the testator. It was held that these notes were transactions had personally between the parties, and the testimony was inadmissible.

With the qualifications thus stated, a vast mass of cases may be determined or influenced by the testimony of the parties to the action directly interested. The practice of almost every day shows this.

And the effect upon the whole Chancery system, in regard to the examination of opposite parties, especially on an accounting, is grave and important; whether in every mode of inquiry,—every form of reference,—whatever be the mode of proceeding, the party is not admissible to testify on his own behalf, to every point. The subject will be better disposed of,

we think, after stating the provisions as to examinations of parties.

Another important change in the rules of evidence now settled by the Code, as amended in 1867, relates to the testimony of husband and wife.

By the act of 1867, chap. 887, § 1, in any trial or inquiry in any suit, action, or proceeding in any Court or before any person having, by law or consent of parties, authority to examine witnesses or hear evidence, the husband or wife of any party thereto, or of any person in whose behalf any such suit, action, or proceeding is brought, prosecuted, opposed, or defended, shall, except as hereafter stated, be competent and compellable to give evidence, the same as any other witness, on behalf of any party to such action, suit, or proceeding.

"Nothing herein contained shall render any husband or wife competent or compellable to give evidence for or against the other, in any criminal action or proceeding (except to prove the fact of marriage in case of bigamy), or in any action or proceeding instituted in consequence of adultery, or in any action or proceeding for divorce on account of adultery (except to prove the fact of marriage), or in any action or proceeding for or on account of criminal conversation." (§ 2.)

"No husband or wife shall be compellable to disclose any confidential communication made by the one to the other during their marriage." (*Ibid*, § 3.)

In Mattison *vs.* The N. Y. Central R. R. Co. (62 Barbour, 364), it was ruled under the Code as it stood in 1860, that the husband or wife was a good witness for or against the other in cases where they were parties to the suit.

In Southwick *vs.* Southwick (49 N. Y. R., 510), it was held that the husband was admissible as a witness

in his own behalf, in an action brought against him by his wife for moneys belonging to her separate estate. There were no other parties to the suit.

It was also held that he could testify as to conversations with his wife, in which she agreed that various sums paid by him to or on her account should go to the account of what he had received. There was nothing of the nature of confidential communications in these dealings.

We have not found a case in which the phrase "confidential communications," used in the section, is defined. It may be that they should be such as, presumptively at least, were made by virtue of the marriage relation; such as to a physician by reason of his profession; and the information sought must, we presume, be what the husband or wife knows only from such a communication. If derived from any other source, the party may be compelled to answer, although also derived in this manner.

The subpœna is that used on trials generally. For the forms of an affidavit of service and attachment, see Appendix, Nos. 5 and 6.

*Commission.*

It is presumed that the course for procuring testimony in another State is governed by the Revised Statutes, with a few exceptions springing from the Code. (See 2 R. S., 393, § 19, etc.)

We apprehend that the weight of authority is, that *a party* may be examined on commission on his own behalf. (Bigelow *vs.* Mallory, 17 Howard, 428; Burling *vs.* Ogden, 14 *Ibid*, 77; 6 Duer, 681; *Contra*, Fairbanks *vs.* Tregent, 16 *Ibid*, 187.)

The referee has not power, as we judge, to issue a com-

mission. In the case of Morford *vs.* Walbridge, 1873, before the writer as referee under an order to hear and determine, the subject was carefully considered, and the counsel and referee concluded that there was no such power. But, in analogy to the former practice in Chancery, the referee gave a certificate of such commission being necessary and proper. The application was then made under the statute, with the affidavit required, and the provisions were followed, except that, by consent, the commission was returned to the referee.

A rule of the Supreme Court of the first district classes a motion for a reference or a commission among the preferred motions at Chambers.

The general rules which should govern a referee in granting such a certificate are those which govern the Court in allowing a commission. The following are leading cases: Anon (1st Vernon, 334); Oldham *vs.* Carleton (4th Bro. Ch. Rep., 88); Rengmont *vs.* Royal Ass. Co. (7 Vesey, 304); Boughden *vs.* Bodge (2 Swanston, 258); Jackson *vs.* Strong (13 Price, 309); Wright *vs.* Jessup (3 Duer Rep., 642); Schaffer *vs.* Wilcox (2 Hall, 502); Mygatt *vs.* Garison (18 Abbott, 292).

It is deduced from these cases that, as a general rule, the points to which the witness is to be examined need not be stated in the petition or affidavit. But the Court sometimes requires this.

That, as another general rule, the names of the witnesses should be stated. But this is not inflexible. When the transaction in question arose at a foreign place, and it is evident the witnesses are most probably there to be found, the names will not be required. (Carbonell *vs.* Dessell, 5 Simons, 638.)

But it should be shown not merely that evidence exists in a foreign place, but that it does not exist here, and the affidavit should show that the party

has stated to counsel what he expects to prove, and is advised it is material, etc.

The party who takes out a commission is not bound to read it in evidence; but if he refuse, the opposite party may do so. (Weber *vs.* Kingsland, 8 Bosworth, 415.)

But in Gillatly *vs.* Lowery (6 Bosworth, 113) it was also held that a party who has sued out a commission, does not, by reading parts of it, make evidence of what is irrelevant or incompetent.

## SECTION VIII.

### *Examination of Parties.*

The Code has, we apprehend, superseded all the former rules as to examination of parties, at least in actions under it and upon a reference to hear and decide. The 389th section, after abolishing an action for discovery, provides: "Nor shall any examination of a party be had on behalf of the adverse party except in the manner prescribed by this chapter."

Then, by section 390, a party may be examined as a witness by the adverse party, or by any adverse party, and may be compelled, in the same manner and subject to the same rules of examination as any other witness, to testify either at the trial, or conditionally, or upon commission.

The examination may be rebutted by adverse testimony. (§ 393.)

"A party examined by an adverse party, as in this chapter provided, may be examined on his own behalf, subject to the same rules of examination as other witnesses. But if he testify to any new matter not responsive to the inquiries put to him by the adverse party, or necessary to explain or qualify his answers

thereto, or discharge when his answers would charge himself, such adverse party may offer himself as a witness on his own behalf in respect to such matter, subject to the same rules of examination as other witnesses, and shall be so received."

To understand the alterations made by the Code on this branch of evidence we shall briefly advert to the rules which formerly prevailed. They are nowhere better stated than by Mr. Erskine as to the law of the Scottish courts, founded like those of the English Chancery, upon the Civil Code (Institutes Book, 4, Tit. 2,3,5.) Regularly no person's right can be proved by his own oath, nor taken away by that of his adversary. But where the matter in issue is referred by one of the parties to the oath of the other, such oath, though made in favor of the deponent himself, is decisive on the point; not because a party's oath in his own cause is evidence, but because the reference is a virtual contract between the parties, by which they are understood to put the issue of the cause upon what shall be deposed. An oath upon reference is sometimes qualified by special limitations restricting it. The qualities which are admitted by the judge as part of the oath are called intrinsic; those which he rejects or separates from the oath, extrinsic. Where the quality makes a part of the allegation which is relevantly referred to oath it is intrinsic. Thus, a merchant suing for furnishings, must, in order to make a relevancy, offer to prove by the defender's oath not only the delivery of the goods but that the price is still due. Therefore, if the defender acknowledges the receipt of the goods, yet if he adds that he paid the price,—the last part, being a denial that the debt exists, is intrinsic, since it is truly the point referred to oath. Where the quality does not import the extinction of the debt, but barely a

counter claim, or *mutua petitio*, against the pursuer, it is held as extrinsic, and must be proved *aliunde*.

And see Thompson vs. Lane, 7 Vesey, 519.

And by the 105th rule of the Court of Chancery, the Master, upon a reference, might examine the parties upon interrogatives or orally, as the nature of the case might seem to him to require. In Benson vs. Le Roy (1 Paige, 122) the Chancellor said that the practice of examining orally before the Master did not change the rights of the parties. There could be no cross-examination by the party's own counsel. His answers were testimony when responsive, and he might accompany them with any explanation fairly responsive to the question.

Now, under this section of the Code, the course would be this: Upon a question whether the party had not received a sum of money on a certain day, the answer admitting it would be complete, and a further statement that he had applied it subsequently by direction of the plaintiff would not be responsive and admissible then; but he could afterwards be examined to this very point, and to any other which would remove his liability. And then the other party may be called to repel the testimony.

In Wiggins *vs.* Gans (4 Sanford's Rep., 646), Mr. Justice Mason, Duer and Campbell Justices, concurring, noticed this clause in section 395, that a party called by "the adverse party might be examined on his own behalf to any matter pertinent to the issue. If this applies to the examination of an accounting party, then when examined touching his receipts he might prove by his own oath all his payments, and discharges, and vouchers would be unnecessary. The authors of the Code could not have contemplated such injustice."

I have been unable to find any other case taking a similar view; and, reasonable as it may be, the provisions we have noticed, both in these sections and in sections 398-399, appear to make it very doubtful.

But supposing that a mere reference to state an account is not within the 395th section, as not being a trial, which is defined the judicial examination of the issues between the parties (§ 252), the anomaly would be presented, that if the Court took the account the section would apply, though not if taken by a referee. But further suppose an examination precisely upon the Chancery principle of responsive or irresponsive, what can prevent the examinant being called to state everything in his own favor not elicited fairly by the examination?

In a case before a referee, the account of an executor was produced in the usual form, with the usual verification. For one item, over one hundred dollars, he was offered to prove that he paid it, took a receipt, and had lost it. The point was discussed by counsel, but the suggestion that a voucher could easily be obtained from the creditor himself was acted upon.

## SECTION IX.

### *Production of Books, Etc.*

The rules upon this subject, we presume, are to be exclusively found in the practice of the Court of Chancery, as it existed when the Code was adopted. We are speaking of the production of books, etc., in the Master's office. The Code has no provisions governing such a case. The 388th section relates to an admission or inspection of specific papers. It contemplates an order before trial, and the power is given to the court before which an action is pending, or a judge or justice thereof.

The 14th rule of court, as well as the 15th, 16th, and 17th rules, are framed to carry out practically this provision of the Code. We conclude that section 469 and rule 97 authorize the resort to the old practice for a guide.

The clause in a decree for an account as to production was as follows: "And for the better taking of such account all parties are to produce and leave with the Master (referee) all books, deeds, and writings in their possession, custody, power, or under their control, relating to the matters in question as he shall direct."

The referee should issue a summons, appointing a day, with an underwriting thus: "At which time the ——— is to produce, etc., following the words of the clause in the order, or to sign a notice appointing a day and place for the production. (See *post*, Title II., Chap. I., § 2.)

By the 103d rule of the Court of Chancery it was to be in the discretion of the Master how long the books, etc., were to be left in his office. He could also direct that they be left and examined in some other place if more convenient. The English order, the 60th of 1828, was similar. The Court would not interfere with the exercise of his discretion, whether the books, etc., should be deposited with him or an inspection permitted at some other place. (Henna *vs.* Dunn, 6 Mad. Rep., 340; and see 1 Simons Rep., 388.)

For the form of an affidavit on production see Appendix No. 7.

The Chancellor in Hallett *vs.* Hallett (2 Paige, 432), said: That when it is referred to a Master to superintend the inspection or production, or a party is to produce before a Master, or under the direction of a Master—the course was that all parties interested in the production should have an opportunity to examine whether the order is fully and fairly complied with.

The Master should adjourn for a reasonable time to enable the complainants to examine the papers, and they might examine the defendants on interrogatories or orally, as the Master should think proper.

In Frazer *vs.* Phelps (1 Code Rep., 214, N. S.; 3 Sandf. Rep., 741) it was declared, that a referee, to whom all the issues in an action had been referred, had not authority to order the production of books, etc., unless there was a provision in the order to that effect. The power was limited to the court, or a justice thereof.

When he was ordered to take an account his certificate that a production was necessary was sufficient for an order. The other party must show that there was no necessity for the production.

In North *vs.* Platt (7 Robert Rep., 207), at Special Term., the action was a common law suit, and a motion was made to insert in the order of reference a clause directing the production of books, etc. The judge examined the case of Frazer *vs.* Phelps (3 Sandf., 741; and 4 *Ibid.*, 682), and showed that the decision was expressly limited to orders in equitable actions, as to which the former Chancery practice was to govern.

Ludlow *vs.* Knox (7 Abbott N. S., 412, Ct. of Appeals) is a case of leading importance upon this subject. The action was by a receiver appointed on supplementary proceedings against one partner, to reach his interest in the assets of the firm, and against the other members. An order of reference was made "to take and state an account of the partnership affairs, the defendants to produce before the referee, under oath, all books, papers, deeds, or writings, in their custody or under their control relating thereto, and to be examined under oath (*orally*) or upon interrogatories, as the referee should direct." The referee appointed a day for production. Some books were

produced, but the defendant refused to leave them with the referee. He offered to allow the referee to examine them, but not the plaintiff in the supplementary proceedings, who was also called as a witness by the receiver. The referee certified that he could not examine the books satisfactorily without their being left with him. At the special term the party was adjudged in contempt, and a heavy sum imposed as a fine, and a large amount for fees and costs. The order was affirmed by the General Term, reducing, however, the sums allowed very largely.

On appeal it was held that he could not be deemed in contempt for not leaving the books, as the order did not direct this. Whether he could be ordered to leave them was a question not arising.

But the referee had directed that the ledger be shown to the witness to enable him to testify to certain matters. He was guilty of a contempt in not submitting to this direction.

The Court had erred, however, in fixing the gross sums to be paid. There was no such power. The taxable fees and damage actually sustained was the measure. The order was reversed, and sent back for further proceedings.

This case, then, recognized the validity of an order to produce and a right to have a book exhibited to a witness to aid him in his testimony. The order was in the long-used form, except as to leaving the books with the referee. We submit that the Court could not have meant to cast a doubt upon the legality of such a clause. It has been used in the Court of Chancery from the earliest period. (See Lidden *vs.* Lilliard, 1 Simons' Rep., 388; Henna *vs.* Dunn, 6 Mad. Rep., 340; Hallett *vs.* Hallett, 2 Paige, 431; Rule 103 of Court of Chancery.) It is, we may say, indispensable in numer-

ous cases, and is one of the most valuable means of arriving at the truth in complicated accounts. Besides, it should be considered that in cases of this nature very generally there is something of a right in or to the books in the party calling for them. An executor's books are similar to the books of an agent for all persons who have a claim upon the estate. So of any one who is in a fiduciary position; but particularly is this the case in a partnership.

The right of the party to seal up such portions of the books, etc., as he distinctly swears do not relate to the matter, has been fully recognized. The Court in Campbell *vs.* French (2 Coxe's Cases, 286) say: "That the case often occurs that where parties are directed to produce books of accounts they are permitted to seal up and conceal all the other parts of the books relating to other accounts." In the same case as reported (1 Anstr. Rep., 58), it is said: "The defendants swear to having produced extracts of everything relating to those bills; that the other parts of the letters do not relate to them. They have sworn at their peril, but very fully, and we cannot order the production of the other correspondence, as we have no inquisitorial authority to investigate the other commercial transactions of these merchants. So when a party refers to extracts from books of account, those parts which he swears to be immaterial are left sealed up."

So in Dias *vs.* Merle (2 Paige, 494), this right of sealing up was recognized, and a party who had broken open the sealed parts was punished as for a contempt, and prohibited from inspecting the books afterwards, except in the presence of the Master and the party, and from using any information so obtained by him.

The party's oath that the sealed parts do not relate to the matters must be taken as sufficient in the first

instance. But if the adverse party can show any fair ground for supposing that some part sealed up is material, whether designedly or not, he may require it to be opened. If refused, the opinion of the Master must be taken ; and on his certificate that such part should be opened, the Court will order it, unless satisfied he is wrong.

In the same case of Dias *vs.* Merle, a portion of a journal produced by the defendant was sealed up. An entry in the ledger, with the page noted, being one of the pages closed, led to a strong belief that it did refer to the matters in dispute. The Master gave a certificate of the facts, with his opinion, and the Court made an order for unsealing the page thus indicated.

## SECTION X.

### *Dismissal of Complaint.*

By the 32d rule of the Supreme Court, on a hearing before referees, "the plaintiff may submit to a nonsuit or dismissal of his complaint, or may be nonsuited, or his complaint be dismissed in like manner as upon a trial, at any time before the cause has been finally submitted to the referees for their decision ; in which case the referees shall report according to the fact, and judgment may thereupon be perfected by the defendant."

In Coffin *vs.* Reynolds (37 N. Y., 640), upon a trial before a referee, and before any testimony was taken, a dismissal of the complaint was allowed upon the ground that it did not state a sufficient cause of action. On appeal, the Supreme Court affirmed the judgment of dismissal. And in the Court of Appeals it was

held that such a motion could properly be granted. It had been sanctioned by several adjudications.

In Morange *vs.* Meigs (54 N. Y. R., 208) it was decided that a referee had power to dismiss the complaint on the plaintiff's neglect to appear, or on his failure to proceed with the reference. This proceeding was in harmony with section 238 of the Code, made applicable by section 272.

In Emory *vs.* Pearce (20 N. Y. R., 62) it is ruled, that if a case is stated which entitles the plaintiff to any remedy, either legal or equitable, the complaint is not to be dismissed for praying a wrong judgment.

In Leopold *vs.* Hernandez (47 N. Y. R., 313, 1872) the General Term reversed a judgment entered upon the report of a referee ; but the reversal did not state that it was reversed on a question of fact. It was therefore to be assumed that it was on a question of law.

No error of law appeared on the findings. He found that the note in suit was wholly without consideration, which constituted a full defense. On these exceptions to the findings and conclusions, his judgment could not be reversed.

But it appeared that on the trial the defendant moved for a nonsuit, which was granted, and an exception was taken. The referee afterwards made the findings in his report. A question of law thus raised. The evidence, though not sufficient to constrain him to find that there was a consideration, yet was such as would have required its submission to a jury, and might have warranted a finding for the plaintiff. Had he denied the motion and then passed upon the fact, his conclusion would probably not have been disturbed.

## SECTION XI.

### *Report—Time for Making, Etc.*

The referee or referees shall make and deliver a report within sixty days from the time the action shall be finally submitted; and in default thereof, and before the report is delivered, either party may serve notice upon the opposite party, that he elects to end the reference; and thereupon the action shall proceed as though no reference had been ordered; and the referees shall not in such case be entitled to any fees." (Code, § 273, 1866.)

The language of the section implies that the report may be delivered after the expiration of the sixty days, and at any time until the notice provided for is served.

In Mantles *vs.* Myers (26 Howard, 409) it was held, that if the party took no step consequent upon the omission to deliver the report, he was held to have waived the irregularity.

The time may be extended by consent, and this may be either orally or in writing. (Livingston *vs.* Gidney, 25 How., 1.)

And even after the extended time has elapsed, the report may be delivered until such notice is given. This was held in Thieplin *vs.* Rossett (3 Abbott, N. S., 54), both at Special and General Term.

If there has been no consent for an extension of time, or it has expired, and a party has served the notice under the section, the Court cannot make an order giving further time.

In Niles *vs.* Maynard (28 Howard, 390) it was ruled that where there was no act of either party to delay a

referee in making his report, and no order made within the sixty days for further time, or notice of a motion for such order, it is the absolute duty of the referee to make and deliver the report within the time.

If the report is delivered in such a case after the sixty days it will be set aside as invalid.

If the successful party neglect to take up the report after a reasonable time has elapsed, an order may be obtained from the court directing him to do so, and enter judgment, or that the other party may do so in his default. If there is a dispute as to the fees of the referee, they can be taxed. (Richmond vs. Hamilton, 9 Abbott, 71, N.)

### *Control of Case Until Delivery of Report.*

The referee has control of the case, and may allow further evidence to be produced in his discretion after the case has been closed, and until he has delivered his report. This terminates his jurisdiction.

In Pratt vs. Styles (17 Howard, 211) this point was determined at General Term.

In Fielden *vs.* Lahens (2 Abbott, Ct. of Appeals Cases; and see 9 Bosworth, 436), after the plaintiffs had rested, and the referees had announced their conclusion to nonsuit, further evidence was offered by the plaintiffs. "It could not be pretended that under the rules governing trials at law the plaintiffs, after having closed their case, were entitled to open it, and introduce evidence not refuting, but competent and proper in the first instance to make out their case. The referees had a right in their discretion to admit or exclude this evidence, and their decision is not subject to review upon an appeal."

## SECTION XII.

### *Findings.*

"The referee shall state the facts found and conclusions of law separately." (Code, 272.)

By rule 41, upon settlement of a case, the justice or referee shall correct and settle it according to the facts, and shall at that time *find on such other questions of fact as may be required by either party, and be material to the issue.* Prior to the amendment of the rule by the insertion of the words italicized, the duty of the referee was and so remains, to find in his report the facts in relation to every issue on which his conclusions rest. Then one question on an appeal would be, Is his conclusion of law justified by the facts he has found. Admitting their entire truth, and that there are no other material facts in the case, was his decision according to law?

This was the rule as stated in Rogers *vs.* Board (20 Howard, 282), and if a review of the findings of fact was asked, a case containing the evidence enabled the General Term to decide if his findings were correct or wrong.

And so, we suppose, if the referee passes upon each issue raised on the pleadings, he need not do more. He is not bound to suppose an appeal, and to find what tends to sustain the case of the unsuccessful party, though in his opinion not sufficient to do so.

It was also held that it was not proper for him, in settling a case, to add to or vary his findings. It was to be settled according to what had actually taken place in the trial before him and before his report was delivered. (Voorhis *vs.* Voorhis, 50 Barbour, 120.) There might be an exception where he had been re-

quested to find specially during the trial, or before report.

But there was a mode of procuring findings, upon the application of a party before a review of the case on appeal. In Lefler *vs.* Field (47 N. Y., 407) it was held that a motion could be made in the Court below before the argument of the appeal from the judgment to compel the referee in settling the case, to insert such part of the proposed matters as related to the points or claims made before him, and to send the case back to him for further findings, if it should appear that they were necessary for a proper review of the judgment.

If requests made upon the trial to find facts, or conclusions were improperly disregarded in settling the case, the course by a motion for a resettlement was open. (See the same case in the Supreme Court, 50 Barbour, 409.)

The subject was examined in the case of Quincey *vs.* Young (53 N. Y. Rep., 504). On the settlement of a case, the defendant requested findings upon over one hundred points. We pass over that monstrous abuse, which no case from the date of the year-books to the present day could justify. Even Judge Robinson did not condemn it with sufficient severity. The referee adopted four of them. He refused to find ten. He passed over 79 without making any decision.

A motion at Special Term, in October, 1872, for an order that the referee pass specifically upon these requests was denied, and the order of denial was affirmed by the General Term. An appeal was taken to the Court of Appeals from this order. An appeal from the judgment had not been heard.

The appeal from the order was dismissed. There might be a review of such an order upon an appeal from the judgment, if it was affirmed at General Term.

It seems that if upon an appeal from such a judgment, the Court should determine that the questions upon which the Court below refused to require the referee to pass, were material; that there was evidence, upon which he might have found them, in favor of the appellant; and that such findings would have entitled him, at General Term, to a reversal of the judgment entered upon the report, the judgment of affirmance will be reversed, with directions that the General Term send the case back to the referee for the necessary findings.

In Meagham and others *vs.* Burke (54 N. Y. Rep., 217) the plaintiffs sued as assignees of various accounts and demands against the defendants. The answer set up a denial of the title of the plaintiffs, payments, and various offsets. On the trial before a referee, the defendant's counsel made various requests for specific findings, embracing all the questions in controversy. The referee refused so to find, and reported generally that the plaintiffs were assignees as stated, and the defendant was indebted thereon in the sum of $532. Judgment was entered accordingly.

The Court declared that the courts of appellate jurisdiction had for a long time indulged in very liberal intendments in favor of the judgments of inferior tribunals; and the decisions of a judge without a jury, and of a referee, have been approved upon very general findings of fact, and even without any findings of fact. It was now well settled that where a party claims that the facts of a case entitle him to judgment, he must procure from the judge or referee such a finding as will affirmatively show that his claim is well-founded.

"I think a referee or judge trying a cause without a jury is bound to pass one way or the other, if requested

to do so, upon every question of fact involved in the determination of a material issue, whether the evidence be conflicting, or uncontradicted ; and a refusal to do so is error, which may be corrected by pursuing the practice above indicated (the application to the Court, as in Van Syke *vs.* Hyatt, and Morgan *vs.* Mulligan, 50 N. Y. R.. 665). If he finds a fact against evidence, a General Term of the Court may set it aside. If he finds a fact wholly unsupported by evidence, or refuses to find a fact which the evidence clearly establishes, it raises a simple question of law which, if excepted to, must be dealt with in the ordinary form in the Court of last resort." The judge cites Putnam *vs.* Hubbell (42 N. Y., 106), and Beck *vs.* Sheldon (48 *Ibid*, 365).

"If the application for further findings is refused, the proceedings to obtain them can be inserted in the record, and their materiality judged of at the General Term, or in the Court of Appeals on an appeal from the judgment of such Term."

"Until the referee has found one way or the other upon the material controverted questions of fact, it cannot be determined whether his conclusions of law are right; and the judgment of this Court in such a case should be that the General Term send the case back to the referee for the purpose of obtaining the necessary findings. If, on the contrary, we should, on hearing the appeal from the judgment, decide, that the questions upon which the referee was asked to pass were immaterial or were mere items of evidence not proper subjects for specific findings, and no error appeared in the decisions actually made by the referee, the judgment should be affirmed and the case would be disposed of on one hearing, instead of being heard in sections."

In the case of Clement *vs.* Jones (Aug., 1874) the action was to recover a royalty for the use of a patent right for manufacturing post-office locks, agreed to be paid under a written contract between the parties. The defense was payment in full. The material question was whether any royalty was due upon articles on hand at a given time (the termination of an employment of the plaintiffs), but then in an incomplete state, and subsequently perfected under the patent. The referee to whom the cause was sent to hear and determine held, that the royalty was due upon all the locks to which the patent had been applied at any time whatever. The duty to pay was co-extensive with the benefit to be assumed as derived from the use. Accordingly he found the whole number so manufactured under the patent right, the amount of the royalty incurred upon the same, the payments on account, and the balance due. His conclusion of law was that the plaintiffs were entitled to recover such balance, and that judgment be entered accordingly; which was done.

The defendants intending to appeal obtained an order at Special Term that the referee find and report the day on which the employment of the plaintiffs ceased, and the number of completed locks then on hand, completed under the patent. His case was, that he was answerable for that amount only. His liability depended upon the continuance of the service of the plaintiffs, as well as the use of the patent.

It is obvious that if the referee's construction of the articles of agreement was right, his findings comprised everything material in the case. And again it is clear, that if the defendant was right, the proposed findings brought into the case everything necessary to enable the Court, if it agreed with his version, to make a final disposition of the whole cause.

In the case of Hunt *vs.* Chapman (1874) before the writer as referee, the action was to foreclose a bond and mortgage. The defenses were:

1. That it was executed upon receiving a transfer of property fraudulently represented to be of vastly greater value than it proved to be, and under circumstances of imposition upon the ignorance of the assignee and mortgagor.

2. That it was given on the further consideration of an assignment of three bonds and mortgages represented to be valid and subsisting securities, when they had been fully paid and discharged.

3. That certain notes and accounts had been put in the hands of the plaintiff for collection, and he had received moneys thereupon not paid over or accounted for.

The referee found upon these issues specifically: that there was no such fraudulent representations as to the value of the property transferred, nor as to the three mortgages assigned, but the defendant was apprised of their being supposed to be extinguished as liens, by certain transactions; and that no collections had been made on the notes and accounts, nor was the plaintiff responsible in any sum on such account.

Upon the settlement of the case the defendant's counsel requested findings as to twenty-four matters, in addition to those found in the report.

"The writer was led to examine the cases carefully, and submitted the following as his conclusions:

The referee is bound to pass upon each of the requests proposed in some form, either admitting or denying, or with modifications. He must not ignore or decline to pass upon any. His omission is not equivalent (as I first thought it might be) to a refusal to find

them. Either party may then except to his rulings, and such exceptions are, I suppose, to be inserted in the case as finally made up.

I apprehend that if a fact is fully admitted by both parties on the pleadings, it is needless and improper to make it a special finding.

And so if a document is set forth in the pleadings, or in the case as proposed, the authenticity of which is unquestioned, the referee ought not to set it forth in a finding. The General Term will surely act upon it, when it is found in the case as evidence, as if it was repeated in a finding.

The more difficult question is whether a proposed finding is material to the issue.

The materiality required is materiality to the case of the unsuccessful party. Of course the referee will not (unless he reverses his former conclusions) find anything contradicting or overthrowing his previous results. But many facts may be found, the truth of which will not be sufficient to impeach those results, at least in his judgment. Such facts, I judge, he is bound to find.

But what is the meaning of the term *fact* in this connection? I have before observed that unquestioned documents, if in the proposed case, should not be repeated in findings. Yet they are facts. It seems to me that the word refers to deductions from the collation of various pieces of oral evidence. So far the rule would be plain. And it may also be (and would be expedient) that even if the fact rests upon a single item of testimony, and that is oral, if it is uncontradicted and consistent with all else, the referee should find it.

For example, in the case of H. *vs.* The Mayor, etc., of New York (1874), before me as referee, the

action was by a publisher of a newspaper for work and printing the proceedings of the Boards in a newspaper, under resolutions of such Boards employing him. The defense was, that there was a statute in force at the time, by which the Mayor and Comptroller were to designate newspapers in which such proceedings should be published, and prohibiting the publication in any other paper, and the right to recover any compensation for such publication. The designation had been duly made, and was in force. But the names had not been communicated to the Board or Clerks, which was directed.

The referee, under decisions of the Court of Appeals, held, that the want of the communication did not affect the obligation or prohibitions of the statute, and the plaintiff could not recover. The facts of the selection, dates, and time of the publication were enough to sustain his report if his law was right. But clearly the other party was entitled to the facts of the omission, which were proven by witnesses, upon settlement of the case.

The referee may be called upon by either party during the trial, and of course before the report, to pass upon specified findings. It would be of great practical importance, if a rule was adopted requiring a referee to give notice to the parties of his report being prepared and open for examination by either. Then that a reasonable time should be allowed for filing requests to find, with him. Those which he adopts should be introduced into the report, and those which he refuses should be stated in a certificate of their being proposed, and by which party, and of his decision upon them. This would be analogous to the old practice of the draft of a Master's report being submitted to the solicitors of the parties, with a view

and to enable them to make objections. No one of experience can fail to see the great advantages of such a course.

By this course a resort to the Special Term would, we suppose, be superseded. The party might still be at liberty on the settlement of the case to supply any oversight, by requesting further findings. We think that thus the practice will be as convenient and inexpensive as the subject will admit.

## SECTION XIII.

### *Decision—Judgment.*

"The report of the referee upon the whole issue shall stand as the decision of the Court; and judgment may be entered thereon in the same manner as if the action had been tried by the Court. When the reference is to report facts, the report shall have the effect of a special verdict." (Code, § 272.)

By section 267 the decision of the Court shall be filed with the clerk within twenty days after the court at which the trial took place. Judgment upon the decision shall be entered accordingly four days after the decision is filed. (Amendment of 1870.)

The successful party files the report and enters up the judgment according to the directions. By the thirty-second rule he is to serve a copy of the report with notice of the judgment; and the time within which exceptions may be taken to the report shall be computed from the time of such service.

In Currie *vs.* Cowles (7 Robert, 3) the Court thought it irregular for the referee to deliver two documents, each of which purports to be the original report, even if they be duplicates.

Of course the judgment is entered without any application to the Court. (Bouton *vs.* Bouton, 42 Howard, 11.)

The referee has the power to adjudge that some future action be taken in the cause without completing the whole case himself, and the Court will carry out his decision.

Thus, in Mundorf *vs.* Mundorf (N. Y. Sup. Court Rep., vol. viii. Huns, p. 241), the action was to set aside a receipt given to an administrator for an accounting, and to carry out an antenuptial contract. The cause was referred by consent, to hear and decide all the issues, and to take any account that he might determine should be taken."

The referee decided the equitable issues in favor of the plaintiff, and directed that an accounting should be had of the administration of the estate; declining to take it himself. An order was made at Special Term referring the case to another referee to take such account. This order was affirmed at General Term. The Court say, that before the Code the rights of the parties were determined at the hearing, and if an account was then necessary, a reference to a Master was ordered. That such practice was preserved, not only from its being consistent with the Code, but by the operation of sections 272 and 268, the latter being made applicable to references by the former.

That generally the same referee should proceed and take the account, which he found should be taken; but if this was in any way prevented, the Court had the undoubted right to appoint another for the purpose.

The case of Tufant *vs.* Masil (37 Howard, 531) was cited. In that case, the referee, to hear the whole issues, reported he could not take the accounts of a partnership; that the plaintiff was entitled to a disso-

lution of the firm, and that a receiver be appointed. It was held that the disposition of the case was right, the account could not be taken until the receiver had collected or sold the assets.

And in Cheseman *vs.* Wiggins (1 N. Y. Sup. Court Rep., 595, 1873) the action was by an administrator of a deceased partner against the survivor. An order of reference to decide all the issues was made. The referee reported that for certain reasons an account could not then be taken. That the plaintiff was entitled to an account, and that a receiver should be appointed to sell the property, and an account be had. Judgment was entered accordingly, which the Court sustained. An appeal had been taken, which was held to be wrong. A motion for a new trial was the proper course.

## SECTION XIV.

### *As to Costs.*

By section 306, cost in actions, other than those enumerated in section 305, are allowed or not, in the discretion of the Court.

There is a class of cases in which costs may be given by the referee in his discretion.

In Pratt *vs.* Styles (17 Howard, 211) upon a bill to redeem mortgaged personal property, and to set aside a sale made to a third party, the referee held the plaintiff entitled to judgment, that a tender he had made was sufficient, and adjudged that the defendant pay the costs. It was held that the question of costs was within his discretion, and he had rightly disposed of it.

In Gilliland *vs.* Campbell (18 Howard, 177) the action was upon a note, and the defense was that it

was given on a settlement of accounts, in which a mistake had been made, which left only $26 due, instead of $186, the face of the note. The settlement was of partnership accounts. The referee examined such accounts and found that the defendant was correct. He adjudged that the plaintiff recover the reduced sum with his costs. A justice had no jurisdiction, and the referee's decision as to the costs was correct.

In Howe *vs.* Lloyd (9 Abbott N. S., 257) in an action by or against an executor or administrator, a referee has no authority to adjudge costs either personally or against the estate represented. The power is vested in the Court alone.

And in Graves *vs.* Blanchard (4 Howard, 300) the rule was stated that where the whole cause was referred in an equity suit, the referee was empowered and bound to determine the question of costs as well as the other matters. The opinion of Justice Willard is full and decisive.

The referee has no power as to extra allowances. (The People's *vs.* The Albany, etc., R. R. Co., 5 Lansing, 25.)

But it has been decided that a referee may not decide the liability for costs in suits against executors or administrators. (Mersereau *vs.* Myers, 12 Howard, 300.)

In an action on a money demand on contract, the referee has no power to decide as to the costs. (Tilman *vs.* Kean, 1 Abbott N. S., 23.)

## SECTION XV.

### *Review—Exceptions—Case.*

By section 272 the decision must be given, and may be excepted to and reviewed in like manner and with like effect in all respects, as in cases of appeal under section 268.

The 268th section, as amended in 1867, is as follows:

"(1.) For the purpose of an appeal either party may except to a decision on matter of law arising upon such trial within ten days after notice in writing of the judgment, in the same manner and with the same effect as upon a trial by jury; provided, however, that where the decision filed under section 267 does not authorize a final judgment, but directs further proceedings before a referee or otherwise, either party may move for a new trial at General Term, and for that purpose may, within ten days after notice of the decision being filed, except thereto, and make a case or exceptions, as above provided in case of an appeal.

"(2.) And either party desiring a review upon the evidence appearing in the trial, either of the questions of fact or of law, may, at any time within ten days after notice of the judgment, or within such time as may be prescribed by the rules of the Court, make a case or exceptions in like manner as upon a trial by jury, except that the judge, in settling the case, must briefly specify the facts found by him, and his conclusions of law.

"(3.) But the questions, whether of fact or of law, arising upon the trial can only be reviewed in the manner prescribed by this section—the questions of law in every stage of the appeal, and the questions of

fact upon the appeal to the General Term of the same Court, as prescribed in section 348.

"By that section, in the Supreme Court, Superior Court of New York, and the Court of Common Pleas of that city and county, an appeal upon the law may be taken to the General Term from a judgment rendered upon the report of referees, or direction of a single judge of the same Court, in all cases, and upon the fact when the trial is by the Court or referees.

"The 39th rule of Court, as before noticed, directs that the time within which exceptions may be taken to the report shall be computed from the time of the service of a copy of the report, with notice of the judgment.

"The 41st rule provides, that whenever it is intended to move for a new trial (except for irregularity, surprise, or upon the minutes of the judge), or to review, by appeal or otherwise, a trial by jury, by the Court, or by referees, a case, or exceptions, or case containing exceptions, as may be proper and the party may elect, shall be prepared by the party intending to make the motion or review the trial, and a copy thereof shall be served on the opposite party within ten days after the trial, if by a jury, or after written notice of the filing of the decision or report if the trial be by the Court or by referees.

"The party served may, within ten days thereafter, propose amendments thereto, and serve a copy on the party proposing the case or exceptions, who may then, within four days thereafter, serve the opposite party with a notice that the case or exceptions, with the proposed amendments, will be submitted at a time and place to be specified in the notice, to the justice or referee before whom the case was tried for settlement.

"The justice or referee shall thereupon correct and settle the case as he shall deem to consist with the truth of the facts; and shall, at the time, find on such other questions of fact as may be required by either party and be material to the issue."

As to Findings, see *ante*, § 12.

The time for settling the case shall be specified in the notice, and it shall not be less than four nor more than twenty days after service of such notice.

The lines of the case shall be so numbered that each copy shall correspond.

"When the evidence is taken by a stenographic reporter, the testimony, as taken by him, may be inserted as the evidence in the case, subject to amendment on the motion of either party on the settlement of the case."

We notice that the 41st rule covers every case of a motion for a new trial (except for surprise, etc.) or a review by appeal or otherwise, of a trial had in any way. The motion for a new trial is under the amendment of 1867, above cited. This amendment governs the course before a referee. It is only where the decision does not authorize a final judgment, but directs further proceedings, that a motion may be made at General Term for a new trial.

This changed the former rule, by which a new trial on motion could not be had (except, perhaps, in cases of surprise, newly-discovered evidence, or irregularity before judgment). (Leary *vs.* Roberts, 27 Howard, 599, note; and see Bolles *vs.* Duff, 55 Barb., 580.)

The rule prescribes the same course for making up the case or exceptions in every instance, either for the motion for a new trial before a final judgment, or for a review of a judgment.

In Dainess *vs.* Allen, (14 Abbott, N. S., 363) proceedings for settling a case are minutely stated.

Two classes of exceptions are contemplated. Exceptions taken in the course of the trial to the rulings of the referee as to evidence, etc. After the report no exceptions of this character can be received. (5 Duer, 216; 2 N. Y., 98; 12 How., 486.)

These can be reviewed on appeal, though the case contain no exception to the referee's conclusion of law. (43 Barbour, 48.)

The first step after trial is to except to the legal points involved in the decision, and then to make a case and have it settled. It generally contains the evidence bearing upon the conclusions of fact intended to be reviewed, the exceptions taken during the trial, as well as those taken after the trial to the final decision, and a separate statement of facts found, and conclusions of law. If the case contain no exception, the Court cannot, on appeal, review it.

But exceptions to conclusions of law may be reviewed although the case does not contain any evidence. On an appeal the question is: Has the judge or referee drawn correct conclusions from established facts? (Frost *vs.* Smith, 7 Bosworth, 108.)

Findings of fact need no exception. (Leffer *vs.* Field, 50 Barbour, 407; Magie *vs.* Baker, 14 N. Y., 438.)

The referee had in the case of Dainess (*supra*) found the question of fact in favor of the defendant, dismissed the complaint and gave the defendant judgment on a counter claim. The only exceptions taken were to rulings during the trial.

The Court concurring in a ruling as to the rejection of evidence, the judgment was affirmed.

The course under section 268, as amended in 1867,

for obtaining a new trial when there is no final judgment, is pointed out in the cases of Stanton *vs.* Miller (N. Y. Sup. Court Rep., vol. 1, p. 23), and in Platt *vs.* Platt (*Ibid*, vol. 2, p. 30).

In the former the Court found various facts, and decided that the plaintiffs were not equitably entitled to the performance of a certain contract, but were entitled to damages, to be ascertained in the action, and to be at liberty to move for an issue or reference to settle the same. The case to stand over and the question of costs reserved.

It was held that this was precisely such a case as was contemplated by the amendment of 1867 for a motion for a new trial. If the judge was wrong, a long and expensive further litigation would be avoided.

The case was fully examined. Error in the decision was found and a new trial ordered.

In Platt *vs.* Platt, the judge at Special Term decreed certain conveyances to be null and void, that a partnership was to be deemed dissolved on a certain day, and an account must be taken concerning it, with certain directions for allowances, ordering a reference to state such account, and upon coming in of the report final judgment with costs to be awarded to the plaintiff.

Findings of fact and an interlocutory judgment were to be submitted by plaintiff's attorney upon four days' notice. If there was no agreement as to the referee, the Court to appoint one. The motion for a new trial was denied with costs.

For the form of a case, see Appendix No. 9.

There are some rules and principles adopted by the Courts in dealing with the judgments of referees which are of importance to be noticed.

It is, we deem, settled that if a referee postpones

his decision upon a question of evidence, and declines to pass upon it at the time, and takes it subject to objection, if the evidence is competent, his judgment cannot for this cause be reversed.

In Kerslake *vs.* Shoomaker (8 Supreme Ct. Rep., 436 Huns) evidence was taken by the referee against the defendant's objection subject to his retaining or rejecting it at the conclusion of the case. The Court deemed the evidence to be competent. The course taken could not injuriously affect the defendant's rights. It must be considered as if the same had been admitted absolutely, which would have been proper.

The case of Peck *vs.* Yorke (47 Barb., 131) and the cases there cited are examined and distinguished, or shown to be inconclusive.

And if there is competent evidence sufficient to sustain the findings, his admission of incompetent evidence will not be fatal.

But in Waggoner *vs.* Finch (1 N. Y. Supreme Ct. Rep., 146), where a similar course was pursued, but the evidence was held by the Court to be inadmissible, the referee not having rejected it before report, the error was held material and fatal.

In several cases the report of a referee as to facts has been treated as so conclusive as to require the clearest possible proof of error to induce the General Term to overrule it.

Thus in Hoogland *vs.* Wight (7 Bosworth, 394) it was held that the report of a referee, like the verdict of a jury, in a case of conflicting evidence, is conclusive as to questions of fact.

And in Howell *vs.* Biddlecom (62 Barbour, 131) it was observed: "So much depends upon the appearance and conduct of a witness, that it is never safe to interfere with a finding on a question of fact, unless it is so

flagrantly unjust as to show partiality, corruption, or incompetency on the part of the referee.

We submit that the rule is over-rigorous, and often tends to defeat justice. There are numerous cases in which the demeanor of a witness has little bearing upon the testimony. The better rule would be, What is the best conclusion which the whole testimony leads to? We may assume that if the unsuccessful party has not asked for findings upon other matters than those in the report, he must be deemed as assenting to the referee's findings. And then the rule that he is to be deemed to have negatived all others to which evidence was given, is strengthened. So the question at General Term as to the facts is merely, Is there sufficient evidence to sustain the findings? not as it is often stated, Is the finding plainly against evidence?

In Butler *vs.* Truslow (55 Barb., 293) the Court held that a judgment entered upon the report of a referee will be reversed, when it is entirely and clearly against evidence.

In the late case of Westcott *vs.* Fargo (63 Barb., 349, 1872) it was held that although a referee does not find a particular fact in terms, yet, if such a finding is deemed necessary to support a judgment, the Court will presume a finding, if the evidence authorizes it. There the question was, whether a loss had occurred through the negligence of the defendants. He directed judgment against them for the value of a package.

The Court cites Chubbuck *vs.* Varnum (42 N. Y., 432), which is clear to the same effect, and Rider *vs.* Powell (28 *Ibid.*, 310).

In Platt *vs.* Platt (2 N. Y. Sup. Ct. Rep., 30) it was held that in equity cases the Court will look at the

whole case and see whether substantial justice has been done. If that is the case it will affirm the judgment notwithstanding the admission of testimony, which in ordinary actions of law might have compelled a new trial.

*Court of Appeals.*

By the 268th section of the Code no findings of facts by the General Term shall be required for the purpose of review in the Court of Appeals, and if the judgment be reversed at the General Term, it shall not be deemed to have been reversed on questions of fact unless so stated in the judgment of reversal, and in that case the question whether the said judgment should have been reversed, either upon questions of fact or of law, shall be open to review by the Court of Appeals.

The 45th rule, as amended, is: A party desiring to appeal to the Court of Appeals, in an action tried by the Court or referees, may have the facts, upon which the decision of the General Term was based, settled for the purpose of such appeal, when the case is decided in General Term on a question of fact; and for the purpose of such settlement the party shall, within twenty days after notice of the judgment, prepare and serve upon the opposite party such a statement of the facts as he deems proper.

This rule appears to be founded on the case of Smith *vs.* Grant (17 Howard, 381). The finding of facts at the General Term should be made part of the record on appeal to the Court of Appeals. When different from those found at Special Term, or by a referee, the Court of Appeals should be furnished with the same facts as those on which the General Term formed its judgment.

We presume that it is not obligatory upon the par-

ties to have a settlement by the General Term of the facts. If that court certifies to a reversal on questions of fact it will suffice, but if it deduces facts itself, the statement should be made under the rule.

### *Review—Court of Appeals.*

The following are the leading cases in the Court of Appeals upon the subject of a review as to the facts of a judgment by the Court or referee, Barker *vs.* White (1 Abbott's Court of Appeal Decisions, p. 95); Burton *vs.* The Orient Ins. Co. (*Ibid.* 257); Colburn *vs.* Morton (*Ibid.* 378); Haight *vs.* Williams (46 N. S. Rep., 583.)

It may be deduced that if there is not ample ground for supposing the decision below to be incorrect, the Court of Appeals will not reverse. The nice scrutiny and weighing of evidence belong to the General Term.

The late case of Finch *vs.* Parker (49 N. Y. Rep.), states these conclusions distinctly.

## SECTION XVI.

### *Death of Party or Referee.*

Upon the death of a sole plaintiff in a case where the cause of action survives or continues, there is no abatement under the 121st section of the Code. The order to allow the action to continue by his representative, obtained as prescribed in such section, enables such representative to proceed with the reference from the stage it had reached.

And no doubt the defendant may, in such a case, and after the order to continue is obtained, proceed himself upon the trial. He has also the power to com-

pel the proper party to continue, or to have the action abated under this section.

Upon the death of one or several plaintiffs, if his representative has obtained such order to continue the suit in his name, the reference will proceed. All the previous proceedings will be valid and available. (Moor *vs.* Hamilton, 48 Barb., 120; 44 N. Y. Rep., 666.)

If a sole defendant die before a report is signed, no judgment can be entered upon it. The report is void. (Kissam *vs.* Hamilton, 20 Howard, 309).

If a report in favor of the defendant has been signed, and a sole plaintiff then dies, judgment may still be entered upon it. (Scranton *vs.* Baxter, 3 Sandf. Superior Court Rep., 660.)

The death of a sole referee before his report has been signed terminates the reference. The continuance by a new referee must be by consent of all parties competent to consent, or by an order of the Court, obtained on motion at Special Term.

But if the report has been signed before the death, the successful party may proceed and enter judgment upon it. (Juliand *vs.* Gray, 34 Howard's Pr. Rep., 132.) The other party, if he appeal, may have time allowed to make a case and exceptions, with a stay of proceedings. One of the justices of the Court may settle such case upon hearing the respective attorneys or counsel. (*Ibid.*)

If two out of three referees die before report, the order of reference becomes vacated, of course. (Emmet *vs.* Bowers, 23 Howard's Rep., 300.)

Upon the death of one of three, the others may proceed to settle the case when an appeal has been taken. (Westbrook *vs.* Dubois, 3 Howard P. R., 26.)

## SECTION XVII.

### *Fees of Referees.*

The fees of referees shall be three dollars to each for every day spent in the business of the reference; but the parties may agree in writing upon any other rate of compensation. (Code, § 313.)

These fees are to be included in the allowances for costs inserted by the Clerk in the entry of judgment, under section 311 of the Code.

The referee may require payment of his fees before delivering his report. The party may demand that his bill be taxed.

In Schultz *vs.* Whitney (17 Howard, 471) the Court stated that the clerk could only insert in the roll the fees of a referee at three dollars a day, unless there was produced a written consent for another sum; and if the time was disputed, it must be shown affirmatively by affidavit or other competent proof.

But the referee could only charge for a personal attendance. He could not do so when evidence was taken by his clerk, though agreed to be so taken. An attorney in the cause is not personally liable for payment of the referee's fees. (Judson *vs.* Gray, 11 N. Y. Rep., 408.) Even where the attorney has received money of his clients sufficient to pay them, he may not be proceeded against by attachment. Lamoreux *vs.* Morris, 4 Howard, 245.)

If, in the absence of a referee, the parties consent that another act in his place, and proceed with the case, the referee cannot charge for that person's services.

In Rochmond *vs.* Hamilton (9 Abbott's Rep. 71., *N.*) the referee had reported in favor of the defendants. They refused to take up the report on account of the large amount of the fees, and it was retained. A motion to vacate the order of reference was denied.

The plaintiff might take an order that defendants file the report within ten days, and enter on judgment; and in default, that the plaintiff might do so. The fees might be settled by ordering the referee to have them taxed.

The charge for the fees of a referee should be supported by affidavit. The general affidavit as to disbursements is not sufficient, nor is a certificate of the referee, unless consented to. The affidavit of the referee should state the number of days spent, and that they were necessarily spent. (Brown *vs.* Brindmuller, 14 Abbott N. S., 359.)

A verbal agreement for an increased rate of compensation, entered by the referee upon his minutes, is a sufficient agreement in writing within the section. This was held at General Term in Philbin *vs.* Patrick, (34 How. Pr. R., 629, *N.*) A custom in the place to pay more than the three dollars is not sufficient. (Schultz *vs.* Whitney, *ut supra.*)

The referee may have an action for his fees against the successful party. (Hinman *vs.* Hapgood, 1 Denio, 188.) And also against the attorney of the party if the latter has agreed with him, or even with his client, to pay them. (Judson *vs.* Gray, Court of Appeals, 11 N. Y. Rep., 408.)

## SECTION XVIII.

### *Power of Court other than on Review.*

The Court at Special Term has no power to set aside or interfere with the report of a referee for any error of law or deduction of fact.

In Dana *vs.* Howe (13 N. Y. Rep., 306) issues of fact were joined and a reference to hear and determine ordered. A report was made and judgment entered upon it. The judgment was for the recovery of two separate sums arising from different transactions. On motion at special Term the judgment was vacated as to one of the sums to be paid, with a declaration that the defendant might enter judgment as to that. This order was vacated at General Term, and the order at such Term affirmed by the Court of Appeals.

The power of the Court at Special Term to direct the referee to pass upon further findings of fact, and insert them in a case to be made, has been recognized by the Court of Appeals. (Van Slyke *vs.* Hyatt, 46 N. Y. Rep., 259 ; Leffler *vs.* Field, 47 N. Y. Rep., 407.)

As either party may now require the referee on the settlement of the case to make further findings, it may be doubted whether this practice should now be allowed.

The Court at Special Term has exercised the power of setting aside an order or direction of a referee, for the amendment of a pleading which it was deemed beyond his jurisdiction to make. See *ante*, § 4 of this chapter.

And in a case of undue influences upon his mind, or an intervention with the parties out of his proper

functions, the power has been asserted in several cases. (Livermore *vs.* Bainbridge, 14 Abbott N. S., 227; Gray *vs.* Fisk, 12 Abbott N. S., 117.)

## SECTION XIX.

### *Reference on New Trial Ordered.*

It is a general rule that if the decision of a referee is found erroneous as to matters of fact, and the judgment is reversed, the case will not be sent back to the same referee; but the order of reference will be vacated and a new order with another referee made, or the cause be directed to be tried by the Court.

Thus in Sharp *vs.* The Mayor, etc. (31 Barbour, 578) it was ruled that, upon a new trial ordered, the general practice was to vacate the order of reference on the application of either party, and to refer it to a new referee. The former had heard and seen the witnesses, and his views and impressions were formed.

Sometimes the order of reference has been allowed to stand with the same referee, and this is in the discretion of the Court. Sometimes the order is not vacated, but leave is given to either party to apply for a new referee. (White *vs.* Smith, 1 Lan. Rep., 469.)

Whether the former referee shall be changed or remain is a question addressed to the discretion of the Court, and its exercise is not appealable. (31 Barbour, 578.)

In Billings *vs.* Vanderbeck (15 Howard, 295) it was held, that where the decision of a referee is reversed entirely on questions of law, whether the facts are changed or not, if he has formed no opinion that will

interfere with an impartial finding thereon, there is no ground for substituting another. But if the decision was reversed on the facts, and a new trial was granted because he found against the weight of evidence, and on a new trial he would pass upon the same evidence, questions, and points, it would be right to send the case to a new referee.

We apprehend that an order vacating the order of reference, or substituting a new referee, is essential, or the case goes back to the former referee. The first order stands upon the record unvaried. The tribunal to try the case has been once lawfully appointed, and must be by some lawful act deprived of authority.

In Billings *vs.* Vanderbeck (15 Howard, 295), where a new trial was ordered for a mistake of law by the referee, the Court would not change the referee without consent, but left the order in force.

In a case where the General Term reversed the judgment on a report, because the referee had allowed partnership books to be received in evidence against a special partner, the order was merely for reversal and a new trial. The case was treated by both counsel as going back to the same referee, under the original order. (Van Ingen *vs.* Whitman, 1873-1874.)

And in another case, where the Court of Appeals reversed such a judgment, affirmed by the General Term, because of the rejection of certain evidence under a counter claim, the order was the same, and the cause was retried before the same referee. (Hunt *vs.* Chapman.)

It had become quite a common practice upon reversing a judgment and ordering a new trial, to direct in the order that the evidence taken on the former trial, or portions of it, should stand as evidence on the new trial. Unfortunately the Courts have found them-

selves bound to declare that, where a new trial has become a matter of right, such a condition or provision cannot be made.

Thus in Bruce *vs.* Davenport (5 Abbott N. S., 185; 3 Keyes, 472) the Supreme Court at General Term reversed the decision of a referee, ordered a new trial, and directed that the testimony taken on the former trial be read upon the new trial. (36 Barbour, 349.) On appeal the judgment of the General Term was reversed, and that of the referee affirmed. The direction to read the old evidence was irregular. The new trial as awarded by the General Term was the party's right. (See Bissell *vs.* Dunn, in 3d E. D. Smith, 172.)

In two cases before the writer as referee, the oppressive effect of this rule was felt. In one, the printed case contained one thousand folios. The good sense of counsel induced them to read as evidence on each side the principal part of the former testimony, and then to adduce further testimony. In the other, where delay was an object, all the former witnesses, and several new witnesses were re-examined.

This seems a very unfortunate rule. Because a judge or referee has made a blunder in admitting or rejecting a piece of evidence, or made a wrong deduction, that all rightly introduced or rightly ruled should be rejected and treated as naught, is very injurious for suitors.

# TITLE II.

## INTERLOCUTORY REFERENCES.

### CHAPTER I.

UNDER SECTION 271.

§ 1. To take an Account before Judgment, etc.
(A) By what Rules governed.
(B) Summons or Notice.
(C) Form of Accounts.
(D) Books.
(E) Examination of Parties.
(F) Witnesses.
(G) Report.
(H) Mode of Review.
(I) General Rules upon Accounting.
§ 2. Specific Question of Fact.
§ 3. Question of Fact other than on Pleadings.

SECTION I.

*To take an Account before Judgment, etc.*

*(A)*—A reference may be ordered "where the taking of an account shall be necessary for the information of the Court before judgment, or for carrying a judgment or order into effect."

This provision answers to the Decretal order of the

Chancery system. Generally the Court, having settled the point that a party was entitled to an account, referred it to a Master to take and state the same, reserving further directions until the coming in of the report, when the final decree would be made.

The Superior Court of New York, in Wiggin *vs.* Gans (4 Sandf. Rep., 646), decided that the course of proceeding and practice in the Court of Chancery in force at the adoption of the Code, and not inconsistent with its provisions, was to govern. It recognized the 107th rule of that court as in force, and directed the accounting party to bring in his account and file it with the referee within ten days.

In Ketchum *vs.* Clark (22 Barbour, 319) the action was for a dissolution of a joint stock company, and for an accounting among the associates. After issue joined it was referred to a referee to take and state an account between the parties, and report to the Court with the proofs. Upon the report, a decree of dissolution was made, the report confirmed as to the accounts, and adjudging a certain sum to be due from the defendant, Clark.

On an appeal by him, the Court said: The reference was under the second subdivision of section 271, and was a reference such as, in the old Courts of Equity, was made to a Master in cases of accounting. The practice in Chancery was for the Master to prepare a draft of his report, of which the parties had notice. They filed objections, which the Master considered, and then made his final report. Exceptions founded on the objections could be filed. This course not having been pursued, there was nothing properly brought up on the appeal.

But the Court thought that the objection had been waived by the course at Special Term. It therefore

reviewed the decision, and amended the judgment by reducing the debt declared to be due.

In the case of Paul *vs.* Marshall (14 Abbott N. S., 128) the following important observations were made:

In place of one Chancellor, we have a large number of judicial officers, who are each invested with the same powers and functions as the Chancellor under the former system. These powers are as well defined now as ever; nothing having been added to them, and in nothing have they been diminished. And the Court proceeds to administer equity, guided by the same rules and aided by the same machinery of practice. At the time of the adoption of the Code it was asserted by many, that all distinctions between actions at law and suits in equity were abolished. But it has now been well settled that the Legislature could only affect the mere forms of actions, and that no law could abolish (*had abolished*) the intrinsic difference between the various natures of actions themselves, and that the fundamental prerogative of the Court of Equity to use a discretionary power to adapt its judgment for relief to the particular circumstances of each case, remained unchanged. (Rubens *vs.* Joel, 13 N. Y., 488; Goulet *vs.* Asseler, 22 N. Y., 225; Lattin *vs.* McCarty, 41 *Ibid*, 107; Code, 409.)

In Palmer *vs.* Palmer (13 Howard's Pr. Rep., 363) the Court at General Term held that a referee under an order simply to take and state an account was a mere substitute for a Master in Chancery, and should conform to the practice before settled, as the Court had not adopted any rules upon the subject.

The course in the Master's office was regulated by the rules 107 to 110 of the rules of 1844. Section 462 of the Code, and rule 89 retains the Chancery practice in such cases where it can be applied.

In that case the whole of the issues had been referred. It was a case of partnership alleged in the complaint, which sought an account, and denied in the answer, which set up also a counter claim. The referee decided that the plaintiff was entitled to an account, and then proceeded to state it. He had full power to take this course. A better practice might have been to make a separate report, finding the partnership and liability to account, which report could be reviewed by the Court and a decision had before the account was taken.

To the same effect, as to the prevalence of the former practice, is the case of Wetter *vs.* Schlieper (7 Abbott's Rep., 92).

The 469th section provides that the present rules and practice of the Court in civil actions inconsistent with this act are abrogated; but where consistent with this act they shall continue in force subject to the power of the respective courts to relax, modify, or alter the same.

And by the 97th rule, in cases where no provision is made by statute or by these rules, the proceedings shall be according to the customary practice, as it has heretofore existed in the Court of Chancery and the Supreme Court, in cases not provided for by statute, or the written rules of the Court.

We have, then, upon questions of practice, the following rules for our guidance:

1. Any provision of the Code upon the point.
2. Statutory regulations of practice and proceedings not inconsistent with a provision of the Code.
3. Rules of the Chancery or Supreme Court consistent with the same.
4. The unwritten practice in cases not determined by any of these previous regulations.

Upon these views we proceed to state the practice, in the case of such an order to take an account.

For such an order see Appendix 10.

### *(B)—Summons.*

The form of a summons (Appendix No 11) is taken from the English warrant. (Clark's Tutor in Chancery, p. 39.) It was used extensively by that excellent practitioner, Julius Rhoades, of Albany, and often by the writer as Master. In the case of Morris *vs.* Sands, June Term, 1821, the Chancellor granted an order for an attachment founded upon the service of such a summons.

The underwriting expresses the object of the meeting. In Everson *vs.* The Manh. Co., January, 1834, the Chancellor said that, although the general practice was to state the object in the underwritiug, this could be also done in the body of the summons.

The time of service was by the 100th rule of the Court of Chancery to be such as the Master deemed reasonable; but not less than two days before the day appointed when the solicitor of the adverse party resided in the same city and town, and not less than four when he resided elsewhere, and not less than two days in addition for every fifty miles from his residence.

By the English rule proceedings could not be had *de die in diem*, nor of course an adjournment to a future day, without an order, but fresh warrants were taken out. Lord Eldon overruled Lord Alvanley, who held that the Master had the power (11 Vesey, fol. 362), and decided, that an order was requisite, though Lord Alvanley's rule was the better practice. With the Masters in New York, and before Mr. Rhoades at Albany, the

long settled practice was to adjourn the reference from time to time, according to convenience. This being done, in presence of the solicitors, was a continuance under the original summons. And finally, by the 102d rule of Chancellor Walworth, the Master could proceed *de die in diem*, or adjourn as he thought proper.

There were, however, some exceptions thought expedient by Masters and counsel. Where a party was to be brought into contempt for disobedience of a direction which the Master could make, a summons, duly underwritten, was resorted to. Thus, where books were to be produced, and it was believed they would not be produced, a summons duly underwritten, "at which time the said ——— is to produce, and leave with the Master all books," etc., was served. So in Remsen *vs.* Remsen, in Chancery, an examination showed other books in the party's possession, and he was summoned in this manner to supply them.

And in Story *vs.* Brown, in Chancery, July, 1833, the same course was pursued in fixing a time for the party to produce his account in the form required by the rule.

It is submitted that while this may not be essential, and the 102d rule of the Court of Chancery shows it is not so, it is a very simple and most convenient practice. (Hoffman's Ch. Pract., Vol. 1, p. 524.)

We do not question that the appointment of a day by the referee, and notice of it to the opposite party, may be held sufficient. It is not more simple, and not quite so definite.

### *(C)—Form of Accounts.*

By the 107th rule of the Court of Chancery it was directed, that all parties accounting before a Master

shall bring in their accounts in the form of debtor and creditor; and any of the other parties who shall not be satisfied with the accounts brought in shall be at liberty to examine the accounting party, upon interrogatories or otherwise, as the Master might direct. This course was suggested by Master Courtenay to the English Commissioners, and is contained in the 61st of the orders of 1828. He pointed out the needless delays attending the former course of practice. (See Hoffman's Masters in Chancery, p. 36. A charge setting forth the receipts or claims against the accounting party was filed and proceeded upon.)

If the party acquiesces in the receipt side, the Master will proceed to examine the vouchers for the discharge, and when he has gone through this, will close the account.

In Storey *vs.* Brown, Executrix, and others (in Chancery, July, 1833), the Chancellor said, that where a party is directed to account before a Master, as contemplated by the 107th rule, he must bring in the whole account, including debits and credits, and for the whole time for which he is accountable. Such accounts must also be accompanied with the usual affidavit of the party as to the correctness of the items, both of the debit and credit side of the account, according to the best of knowledge and belief, and that he does not know of any error or omission in the account, to the prejudice of any other of the parties in the cause.

For the form of an account and oath see Appendix Nos. 12 and 13.

In numerous cases before the writer as Master, and several as referee, the following course has been pursued: The account being produced duly verified, the proof of the credits for payments, etc., was first gone into, and all objections to the items claimed either

from the insufficiency of the evidence, or the inadmissibility of the claim as a credit, were disposed of. After that investigation was finished, the party seeking the account was required to file a written statement of items which he asserted should be added to the debits. This was precisely the surcharge known to the Chancery course. (Hoffman's Ch. Pr., vol I., p. 537; Barbour Ch. Pr., 507, 508, etc.)

The present method has superseded the discharge of the old course. The credit side of the account is the discharge. If any item of payment or credit has been omitted, the referee should be applied to, to add them to the credit side of the account. In the case of Mowatt *vs.* Graham, January, 1834, an affidavit was laid before the Master explaining the omission, which was then examined into and allowed.

In other instances, after the account had been produced, the adverse party was required to file a written statement by way of charge and claim, setting forth what items of credit he objected to and what items of debit he insisted upon. In Linder *vs.* Solomon, 1873, and in other cases, this course was adopted. Thus the whole of the case, either upon admissions or allegations, was before the referee.

Generally it would appear that this is the better course. Sometimes a part of the items may be admitted. Sometimes testimony to a credit which is disputed bears upon a debit insisted upon, and *e converso.* And we should notice that a credit disallowed is the same in result as a debit added.

But other considerations will influence the practice. A party questioning items of the account may have no extrinsic evidence to support his demand or objections, but must resort to the examination of the party, or books and papers.

### *(D)—Books, etc.*

As to books, etc., we apprehend, that the right is absolute, not merely to call for them, in order to support a definite claim where it can be made, but to enable the party to discover whether he cannot make such a claim. This is a branch of the old principle of discovery known to and used in the Chancery.

In a preceding part (*ante*, Title I., chap. iv., § 9) we have stated the rules we suppose to be in force. They apply to the reference we are treating of.

In Fraser *vs.* Phelps (4 Sandf. Rep., 682) the order of reference in a case of account contained the ordinary directions in a Chancery decree as to production. On appeal the order was affirmed. On a motion for an attachment all the facts for reversing the decision of the referee could be brought up by his special report or on affidavit.

### *(E)—Examination of Parties.*

In section 8 of chapter iv., Title I., we have discussed this important subject. We have suggested that the Code has effectually superseded the old rules of the Court of Chancery. If a party, in any action, even of the most strictly equitable nature, calls an adverse party, the course is ruled by the 395th and the 399th sections. The last, as amended in 1866, covers every action or special proceeding in every court, every tribunal, and before every officer acting judicially; and it seems an unavoidable inference, that it extends to every inquiry as to any special matter in an action before any court or such officer. As the party may be called as a witness on his own behalf under section

399, it must be that if called by the other side it is admissible for him to state everything which he could be permitted to state had he been so called. Indeed the right to do this is, as we have noticed, recognized in section 295; and the condition or consequence, that the other party may be admitted to repel the testimony, is precisely what must result from section 399 of itself.

And we judge that even if a party is called and examined under section 395, the exceptions and qualifications found in section 399 will limit and control his evidence.

But as these views may be erroneous, it will be useful briefly to notice the practice and principles of the Chancery system.

By the 105th rule of that Court, the Master could examine any party or any creditor coming in before him to make a claim, upon written interrogatories, or *viva voce*, or in both ways, as he thought proper, the examination being taken down by the Master or his clerk.

If written interrogatories were resorted to, they were settled and approved of by the Master, being drawn by the examining party. It became, after much varying decisions, the settled rule, that no exceptions could be taken to the settlement by the Master. The party put in such examination as he thought proper, taking objections to any particular interrogatory, and the judgment of the Master upon the sufficiency of the examination could be reviewed. (Stamford *vs.* Tudor, Dickens, 548; Paxton *vs.* Douglass, 16 Vesey. 240; Anon, Hillary Term, 1779; Hoffman's Ch. Pr., 531; Peck *vs.* Hamlin, 1 Paige, 247.)

But if the examining party proposed interrogatories which the Master refused to allow, or allowed some ob-

jected to by the other party, there was a recourse to the Court. This, in England, was by an exception to his certificate; but it sometimes was by motion or petition. The latter was the better practice with us. (Chennell *vs.* Martin, 4 Simons, 340; Hoffman's Ch. Pr., vol. I., p. 531.)

The Master, having settled the interrogatories, appointed a day for the examination to be brought in. This was one of the cases where a new summons, with the proper underwriting, was necessary. The time for doing so was within his discretion.

If it was not brought in, a certificate of the default was given, and a motion made for an order that it be brought in within a specified time, or cause be shown why an attachment should not issue. (Stoughton *vs.* Lynch, October 4, 1815; Nestell *vs.* Nestell, 24 June, 1820; cited Hoffman's Masters in Chancery, p. 27.)

The examination could be sworn to before a Commissioner of Deeds or any one authorized to take the jurat to an answer. (Nestell *vs.* Nestell, 1824; Peck *vs.* Hamlin, 1828.)

By rule 106, exceptions to the sufficiency of the examination could be filed with the Master; and a time appointed to proceed upon them after service on the adverse party.

These exceptions are framed upon the same principle as exceptions to an answer, and were to be judged of by the same rules. They specify as to what interrogatories or parts of interrogatories the examination is defective or objectionable. (Weston *vs.* Jay, 1 Mad. Rep., 527; Benson *vs.* Le Roy, 1 Paige, 122; Case *vs.* Abeel, *Ibid*, 247.)

Where the interrogatories were to obtain an account of certain property sold by the defendants on commission, the examinants stated that they recollected some

sales, particularizing them ; as to others that they did not recollect them, but that all sums of money received by them on account of such sales, were, as they believed, entered in the books of account produced to and left with the Master. The examination was held to be insufficient. They were bound to recur to the books in order to refresh their recollection and make the statements ; and they might accompany their answer with explanations fairly responsive to the questions put. (Peck *vs.* Hamlin, 1 Paige, 247.)

If the examination was found insufficient, a certificate to that effect was given, and the time for filing a further one fixed therein. (Case *vs.* Abeel, 1 Paige, 630.) No order of confirmation of the certificate was necessary. It became confirmed, of course, at the end of eight days after notice, unless exceptions were filed and served. (*Ibid.*)

If the examination was certified to be insufficient, the party could add fresh interrogatories to be answered at the same time with those unanswered, or imperfectly answered. (*Ibid.*) But where the examination was sufficient, further interrogatories could only be allowed on special motion to the Court. (*Ibid.*)

But in Sidden *vs.* Forster (1 Simon & Stuart, 335), where the plaintiff after the examination got a trace of other sums received, it was ruled, that the Master could admit fresh interrogatories without an order.

And similar decisions were made in Cornish *vs.* Acton, Dickens' Rep., 149 ; 2 Vesey, Sen., 270 ; Willan *vs.* Willan, Cooper's Cases, 290.)

In the case of Remsen *vs.* Remsen (2 John Ch. Rep., 499) the order was that the parties might be examined *viva voce* as well as upon interrogatories. And the 105th rule recognized this course. In Benson *vs.* Le

Roy (1 Paige, 122) the Chancellor said that the practice of examining orally before the Master did not alter the rights of the parties. There could be no cross-examination by the parties' own counsel. His answers were testimony when responsive, and he might accompany them with any explanation fairly responsive to the interrogatory.

The course pursued in such cases by the writer has in general been to reduce the questions to writing as well as the answers.

The form of the oath must depend upon the view taken of the situation of the party. Under the former system, the verification of an examination was the same as that of an answer, changing the name only; and if the party was orally examined, the oath was framed upon it. If the party is now to be regarded as a witness, the ordinary oath is to be administered. The present writer has as referee pursued the last course.

If the party to be examined refuse to attend, a certificate is to be given. The form (Appendix No. 14) was used in the case of Morris *vs.* Sands, 1821, approved and acted upon by Chancellor Kent.

If an examination is brought in, but was deemed insufficient, the matter was passed upon by the Master, who gave to a party, dissatisfied and seeking a review by the Court, a certificate of his decision. The question was brought up by exceptions. The form (Appendix No. 14) is taken from a precedent in the time of Chancellor Kent. It could be readily adapted to an oral examination, as is suggested in the addition to that form. And we judge that the dissatisfied party files it with his exceptions, which can then be heard at Special Term.

Here again the question as to witness or examinant

influences the practice. If the former, the referee gives a certificate of what took place, and the matter is settled by the Court on a motion for an attachment for not answering in whole or in part.

The nature and effect of an examination under the old system must be noticed. It was of the character of an answer or a further answer of a party, had after a decretal order. When taken from a plaintiff by a defendant it was an answer. When by a defendant on the call of the plaintiff, it was a further answer. (Fowler Exch. Pr., 294; Howard's Eq. Pr., 133; Anon, 3 Atk., 511; Hatch *vs.* ———, 19 Vesey, 116; Case *vs.* Abeel, 1 Paige, 630.) The jurat is the same as to answers.

The settled rule was that the answer of a party or the schedule annexed to it could be used to charge him, while his statements or the other side of a schedule, or another schedule, could not be used to discharge him. (Audley *vs.* Audley, 1 Vernon, 194; Boardman *vs.* Jackson, 2; Ball *vs.* Beatty, 382; Robinson *vs.* Scotney, 19 Vesey, 562.)

The rule as to an examination was the same. (Kirkpatrick *vs.* Love, Ambler, 599; Talbot *vs.* Rutledge, cited 4 Bro. Ch. Rep., 73; Thompson *vs.* Lamb, 7 Vesey, 589.)

The distinction was taken that if the charge and discharge was the same transaction, the statement could avail the examinant. Thus in Blount *vs.* Barrows (1 Vesey pr., 546) the answer was that the testator did on the ——— day of ——— (being about twelve days previous to his death) deliver to this examinant four bonds of £100 each for his use to enable him to maintain a suit which he had commenced.

Mr. Evans, in his notes to Pothier, states the rule thus (p. 158): "A man's own admissions and represen-

tations shall be allowed as evidence against him, but he shall not be subjected to having one part of the same act considered without the other. Although relying upon the admission of one fact shall not conclusively establish the assertion of another, the representation of one and the same fact must not be garbled and distorted."

And the Chancellor in Benson *vs.* Le Roy (1 Paige Rep., 122) recognizes the rule that the party examined as to his accounts cannot give testimony in his own favor any further than his answers are fairly responsive to the interrogatories put to him.

The reasons before stated cause us to doubt whether in this case also the Code has not prescribed a different rule, and whether the examinant is not entitled to testify fully to every point involved.

### *(F)—Witnesses.*

The proceedings for procuring the attendance of witnesses, and for punishing them for disobedience, are the same as upon a reference to hear and determine, except that, as the referee does not in this case act as a judge, the attachment must be obtained by an order of the Court. This is founded on the usual affidavit of service of a subpœna and non-attendance.

The practice in the Court of Chancery was similar. A subpœna *ad testificandum* issued. (Hoffman's Ch. Pr., I., 528.)

The observations upon the subject of witnesses (Tit. I., ch. 4, § 7) apply to cases under this head.

By the 39th rule of Court, in references other than for the trial of the issues in the action, or for computing the amount due in foreclosure cases, the testimony

of the witnesses shall be signed by them and the report of the referee shall be filed with the testimony.

It may be suggested whether this might not be limited to cases where the referee is ordered to report the testimony, or the facts and testimony. In such cases as are now treated of the evidence is often very voluminous, and until exceptions are taken there is no need for its production. In practice we believe this is the construction of the rule. The clause as to filing it indicates this to be correct.

### *(G)—Report.*

Whether the 109th rule of the former Court of Chancery is absolutely binding, so that a neglect of it would be ground to set aside a report, or not, it affords a most convenient guide to the practice. It provided that when the Master has prepared a draft of his report, he shall deliver copies thereof to such of the parties as apply for the same, and shall assign a time and place for the parties to bring in objections and for settling the draft of the report, and shall issue his warrant for that purpose, and no summons to see the draft of the report and take copies thereof shall be necessary. On the return of the warrant, or on such other day as may then be assigned by the Master for that purpose, if objections are filed by either party, he may proceed to hear the parties on such objections, and the Master shall settle and sign his report and cause it to be filed in the proper office, within twenty days after the argument on such objections is closed. If no objections are made to the draft, the Master shall sign his report and file it in the proper office within ten days after the time assigned for bringing in objections."

For the form of a Report, see Appendix, No. 16.

As long ago as 1683 the Lord Keeper made an order upon the subject: "Taking into consideration the delay and expenses that do happen to suitors by exceptions taken to Masters' reports, and especially such whereby accounts are directed to be taken, which might be in a great measure prevented if the Master were informed of the matter of the exception before the signing of his report"—the order proceeds to direct the bringing in of objections in writing on a day fixed.

The Vice-Chancellor of England said: This was a rule not of form, but substance, that the Master may have an opportunity of reconsidering his opinion. (3 Mad. Rep., 639.)

In several cases before the writer as referee the course prescribed by this rule has been observed. One of the parties was apprised of the report being prepared, and served a summons, fixing in the underwriting a day for bringing in objections. In the interim the parties could examine the draft and take a copy if desired.

The 109th of the rules of Chancery regulated this proceeding substantially as above stated.

It is to be wished that this course was positively prescribed by rule. Long experience as Master and referee has proven the signal advantages resulting from it.

In the matter of Merritt Trustees, July, 1858, Justice Harris ruled that this Chancery practice of objections and exceptions was to be pursued. (Cited Wait's Practice, vol. iii., p. 384.)

It was the general rule that the master was not to allow further evidence after his report had been prepared and examined. This was so ruled by Chancellor Walworth in Tyler *vs.* Simmons, August 2, 1836.

In Pattison *vs.* Hick (9 Cowen, 747) Justice Cowen sanctioned the admission of evidence after the report had been drawn up, upon its being proven to the Master that it had not been discovered before.

### *(H)—Mode of Review--Exceptions.*

By the 39th rule of the Supreme Court, "in references other than for the trial of the issues in an action, or computing the amount due in foreclosure cases, upon the coming in of the report of the referee the same shall be filed and a notice of the day of filing shall be entered by the clerk in the proper book, under the title of the cause or proceeding; and the said report shall become absolute and stand as to all things confirmed, unless exceptions thereto are filed and served within eight days after service of notice of the filing of the same. If exceptions are filed and served within such time, the same may be brought to a hearing at any Special Term thereafter, on the notice of any party interested therein."

"And by the 40th rule, when a reference other than of the whole issue has been ordered under section 271 of the Code, and a trial had, if either party shall desire to apply for a new trial on the ground of any error of the judge or referee, or on the ground that the verdict or report is against evidence, a case or exceptions shall be made, or a case containing exceptions, as the case may require, which case or exceptions shall be served and settled in the manner prescribed by the rules of Court for the settlement of cases and exceptions in other cases."

"Such motions shall be made in the first instance at Special Term; and if neither party moves for a new trial in such a case, they shall be deemed to have ac-

quiesced in the decision of the judge or referee and the verdict of the jury or report of the referee, and the same shall not be questioned in the final hearing of the cause or in any subsequent proceeding therein."

We presume this rule was meant, and operates, to do away with the practice of reviewing the decision by an appeal directly to the General Term, which, as well as a motion at the Special Term, was allowed. In Coe *vs.* Coe (37 Barbour, 232) it was stated that there appeared to be only two ways of correcting a report upon a reference to settle claims against executors; one, by appeal to the General Term directly from the judgment upon a case and exceptions; the other, by motion at Special Term on opposing a motion for confirmation.

The appeal will then be from the order at Special Term, granting or refusing a new trial under clause 2 of section 349.

The preparation and settlement of a case is stated *ante*, Title I., ch. iv., §15.

### *(I)—General Rules upon Accounting.*

There are some general rules upon an accounting of constant application, and of importance in guiding a referee.

If a book or paper is produced, and used for the purpose of charging a party, it is available for his discharge. This rule was established as long ago as the case of Stretton *vs.* The Earl of Oxford (1 Eq. Abr., 10), and is recognized in the cases as to the effect of an examination upon interrogatories. It was affirmed by Lord Hardwick in Talbot *vs.* Rutledge, cited 4 Pr. C. Rep., 75.

In Boardman *vs.* Jackson (2 Ball & Beatty, 382) the plaintiff produced a document made out long before

the bill was filed, by direction of the defendant, and furnished to the plaintiff. The Court allowed the one side to discharge the defendant as well as the other to charge.

And in Carter *vs.* Coldrain (Barnardiston's Rep., 126) the defendant produced an account book before the Master to charge the plaintiff, insisting that the whole book was not thereby made evidence for the plaintiff. Lord Hardwick held that the plaintiff was entitled to use it in discharge. Of course, such books and accounts are only *prima facie* evidence, which may be repelled or explained.

Vouchers are *prima facie* evidence of disbursements.

In the case of the Earl of Lonsdale *vs.* Wordsworth, 1789 (2 Fowler's Exch. Pr., 239), vouchers were objected to unless the handwriting was proven. The Court ruled that, in all matters of accounting, the party produced the vouchers at his peril. The Master was bound to admit them in evidence, unless the other side can lay a reasonable ground to show that the voucher in question can be impeached, of which the Master is to judge, and examine into it, if there is reason to do so.

In Lewes *vs.* Morgan (4 Dows Par. Cases, 30) there had been various transactions between attorney and counsel, accounts settled, and securities given up. It was alleged that vouchers had been lost or surrendered at such settlements. The decree directed that the accounts be opened, but that if in taking the accounts it should appear that any voucher in support of any item was lost or could not be found, the party should make oath that such voucher did theretofore exist, and of the contents or purport thereof, and that the same had been delivered to the other party.

In the statute as to the accounting of administrators,

etc. (2 R. S., 92, §§ 54, 55), vouchers are required to be produced for all debts and legacies and funeral expenses. There is the qualification that the party may be allowed for sums not exceeding twenty dollars, and in the aggregate five hundred dollars, for payments, for which no voucher is produced, if the payment is supported by his own positive oath, specifying when and to whom made.

In the report of the Commissioners, appointed under the act of 1870, this provision is adverted to, and it is suggested that items be admitted without vouchers where the party swears that he had such once, and they have been lost or destroyed, and proves payment by the evidence of the creditor, or some other witness except himself and his wife.

Sometimes, where the accounts have been of very long standing, the Court has allowed accounts to be received as presumptively fair.

Thus in Chalmers *vs.* Bradley (1 Jac. & Walker, 65, 1819) the question was as to the value of an estate in the years 1770, 1775, and 1789, for which purpose its state at the time, the attempts to sell it, and the amount of the rents were to be considered. The Master of the Rolls said: "In making the estimate I think the Master will do right, if any account of the rents and profits has been kept, to take them as *prima facie* fair accounts, subject to any objection that the other party may make to them."

And in Peyton *vs.* Green (1 Rep. in Ch., 126) the Court says: "The next question will be whether at any period, and when up to 1789, J. B. was in advance beyond the assets received by him, and to what extent. Here, again, I think it will be very reasonable, if the account was regularly kept of the administration of the estate, that it should be considered as *prima*

*facie* evidence of his receipts and payments, throwing on the other side the onus of impeaching it." J. B. was dead.

*Partnership Books.*

We had supposed that if there was a well-settled and a most important and useful rule, it was that presumptively the partnership books were evidence as between the partners, from the power to inspect, the presumption of its exercise, the reciprocal agency, and the coequal choice and control of clerks. The impossibility of inspection, as from long absence or sickness, might create an exception, especially as to items of charge to the partner.

The Superior Court of New York, in Taylor *vs.* Herring (10 Bosworth, 447), modified this rule so far as to require some evidence of actual access and examination. We refer to the dissenting opinion of Justice Bosworth for a vindication of what we supposed was the undoubted law. But the case was one of a dormant partner.

It would seem, that since the partner can now testify to his entire ignorance of the entries, his never having examined, or only specially, and also as to the error of the entry, the reason of the rule, making such books evidence in the first instance, is much strengthened.

There are some general rules as to the accountability of parties in a fiduciary situation which a referee may be called upon to apply.

*Neglect to Collect Debts.*

It appears to be the settled rule of the Court that, if the executor does not use due diligence in collecting a

debt due at the death, and outstanding on personal security only, he shall be answerable unless he show that there was no time when he could have recovered it.

The leading cases are Lawson *vs.* Copeland (2 Br. C. Rep., 155); Orr *vs.* Newton (2 Coxe's Cases, 276); Fowel *vs.* Evans (5 Vesey, 839). So as to arrears of rent, Tibbs *vs.* Carpenter (I. Mad. Rep., 297).

*Investment on Personal Security.*

Where the executor himself has invested funds on personal security he is personally answerable if the debt cannot be recovered. This rule was declared as long ago as in the case of Terry *vs.* Terry (Precedents in Chan., 273), where the proof was strong as to the ability of the party when the loan was made, but he was in trade. The cases are Adge *vs.* Feulliteau (1 Coxe's Cases, 24); Wilkes *vs.* Stewart (Cooper's Cases, 69); Langton *vs.* Oliphant (*Ibid* 35).

In Holmes *vs.* Dring (2 Coxe's Cases, 1) Lord Kenyon said: "It was never heard of that a trustee could lend infants' money on personal security. This is a rule which should be rung in the ears of every person who acts in the character of trustee."

In Smith *vs.* Smith (4 John Ch. R., 231), the question arose whether the executors should have credit in their account for notes taken for moneys put out. The Chancellor said there was not a bad note among them. It appeared from the testimony that every person to whom they had loaned money was a safe and responsible person at the time, and remained so. It would be unreasonable to charge him with the notes as cash, and throw the trouble and risk of collection upon him.

But if a guardian or other trustee loan money with-

out security, he must be responsible in case of insolvency. This was the settled English rule, and it ought to be followed. When the case was again before him, on the equity reserved, he refused to provide in the decree for the indemnity of the plaintiff in case any of the notes should prove bad.

Certainly, this decision is in direct contradiction to the English rule, as settled in the cases before cited. For example, in Wilkes *vs.* Steward (Cooper's Case, 6) and Vicrass *vs.* Bingfield (3 Mad. Rep., p. 62), the money put out on personal security was ordered to be paid into court.

Time has been given to the executor to enable him to collect the debt. The risk and the trouble should surely fall upon him who has endangered the funds in his hands.

*Interest—When charged to Executors, etc.*

Lord Keeper North, in Ratcliffe *vs.* Graves (1 Vernon, 196), first settled the rule that an executor, etc., who used the money in trade should be charged with interest. It was not adhered to in Lord Hardwick's time, but Lord Thurlow repeated the rule in various cases.

Thus, in Newton *vs.* Bennet (1 Br. C. R., 362), the charge was four per cent. interest, although there was evidence that the profits were probably equal to five per cent. Afterwards, in Treves *vs.* Townsend (1 Coxe's Cases, 50), he affirmed a decree of the Lords Commissioners giving five per cent. upon balances—the funds having been used in trade.

Tibbs *vs.* Carpenter (1 Mad. Rep., 290) is a leading English case, in which the subject was fully discussed. On accounting large annual balances were found on

hand, and no sufficient reason appeared for retaining them. Raphael *vs.* Boehm (11 Vesey, 92) was the only case in which interest was charged from the moment of reception, and interest compounded on half-yearly rests. This had been disapproved of by Lord Eldon. That in Dornton *vs.* Dornton (13 Vesey, 402) interest was given on balances for a certain period at five per cent., and afterwards at four, but without compounding.

The Vice-Chancellor concludes: It appears from all the authorities that a special case is necessary to induce the Court to charge executors with more than four per cent. upon balances in hand. If nothing more is proved than an omission to lay out balances, it is a case of negligence, not misfeasance. It being proved that the executors had not themselves made a profit by the use of the moneys, only 4 per cent. was allowed.

Crackett *vs.* Bethune (1 Jac. & Walk., 566) was also a case of mere, although unwarranted, retention of moneys. Five per cent. was given, but rests to compound the interest were refused.

And lastly, the rule is clearly stated in Flanagan *vs.* Nolan (1 Molloy Ch. Rep., 84). The Court say:

"With respect to the general question of charging an executor with interest, there are two things to be kept in view. First, we are not to look so closely into the dates of a running account to calculate interest upon it as to deter respectable men from undertaking the office of executor; and, on the other hand, we are not loosely to permit any man, however respectable, to retain the money of others in his hands without making it productive. An executor's duty in this respect is to deal with the trust estate as a provident man would deal with his own; and every provident man makes interest of his money, when he has got together a sum which he thinks to be worth while to lay out at inter-

est. In this case it appears that the executor retained considerable sums for a long time. It may be that this money was unproductive in his hands, and that he made no interest. But that is no answer. If the parties suffer loss by his negligence, he is chargeable. I have known instances of executors, upon whom there was no imputation, who were charged with interest upon balances which were lying dead at their bankers, and probably were forgotten. But a Court of Equity takes upon itself to distinguish. If there has been an actual use of money by the executor, then the Court imposes the highest rate of interest; but if no benefit has been sought by the executor from using the money, then it is a case for a reduced rate of interest. In looking accurately into the cases a difference will be found, where an executor retaining a balance was at the same time liable to outstanding demands which, though not called for, it was uncertain when they might be made; the balance in such a case may be called only an ostensible balance."

There are also cases in which the option has been given to the party entitled, to have an inquiry as to the profits actually made by an employment of funds, or to charge interest and at 5 per cent. upon the moneys received of the estate. (Heathcote *vs.* Hulme, 1 Jac. & Walk., 130; Burden *vs.* Burden, there cited.)

The party was entitled to a reference to settle the profits before making an election; but he must take one or the other for the whole period of accounting, if the capital was employed in the same manner during that period.

In our own Court, in Schieffelin *vs.* Stuart (1 John. Ch. Rep., 640), where the administrator had employed the moneys in his trade, the Master charged compound interest. The Chancellor confirmed

his report. He said that such a charge was sometimes necessary to carry into effect the rule of the Court that a trustee should not make a profit or gain from the use of the funds. He makes a statement showing the great gain the party in that case would make if simple interest was alone charged. He cites three English cases as allowing the charge of compound interest; but the Vice-Chancellor in Tibbs *vs.* Carpenter showed clearly that in one of them only was compounding permitted, viz. : in Raphael *vs.* Boehm.

By the Civil Law there was an increase in the rate of interest where the *Tutor* used the funds.

There is much force in the reasoning, as well as simplicity in the application of the rule, which allows compound interest in case of an employment in trade, partly on the presumption that as much has been realized, and partly on the ground of a penalty upon the executor for putting the funds in peril. And the increase of interest in Civil and English law is analogous. But here some distinctions must be noticed.

The gain beyond simple interest by compounding at seven per cent. will, in five years, be $5.24, averaging $1.05 per year. In ten years the gain is $26.66, averaging $2.66 per year; in fifteen, it is an average of $4.72, and in twenty, an average of $7.34 per year. Hence, when compound interest is charged as an equivalent for profits of trade, if the period is five years, the profits are taken at $8.05 per cent. per annum; if ten years, at $9.66; if fifteen, at $11.74; and if twenty, at $14.34. The period for which the compounding is to run must have an influence upon the question.

The recognized mode of stating an account with compound interest is this: The balance on hand, when the charge is to commence, bears simple interest to the end of the year. Every other debit and credit

through the year is totalized without interest; the balance struck, and the interest on that balance computed for the ensuing year. The same process is gone through in each successive year.

Compound interest is not allowed, of course, because of an account rendered, showing a balance made up of principal and interest. But an agreement to allow the charge is to be proven. (1 P. Wms., 653; 1 Eq. Cases Abr., 287; 2 Atk., 331.)

The decree in Barrow *vs.* Rhinelander (In Ch., N. Y., 29 Sept., 1815) directed that the Master make rests in the account, at such times as it shall appear that the parties liquidated their accounts and agreed that the interest then due should be turned into principal.

In Clantouchy *vs.* Latouche (1 Ball & Beatty, 1120) bankers had been in the habit of rendering accounts from year to year in which principal and interest were stated, a balance struck, and this formed the first item of the next year's account. Lord Manners thought that the acquiescence raised a sufficient presumption of an agreement to allow interest upon interest.

The case of King *vs.* Talbot (40 N. Y. Rep., 76) is of great importance upon the duty of investing. It was a suit by legatees against the surviving executor and the administrator of a deceased executor, for an account of their legacies and payment.

The father bequeathed to each of his three children $15,000, the interest, as far as required, to be applied in their maintenance and education, the principal and any accumulations to be paid on their severally attaining their majority. He entrusted to the discretion of his executors the settlement of his affairs, "and the investment of his estate for the benefit of his heirs." He died September 26, 1845. Letters were issued in December, 1846. By June 9, 1847, the executors had

on hand $45,000, but not before. They made investments and changed them; and finally, in April, 1850, set apart for the legacies, stocks of the State of Ohio, of a canal company, and stocks and bonds of various railroad companies, and scrip of a bank.

The amount was $45,390.45 at the price paid for the securities. The account was then debited with the income, and credited with the sums paid for maintenance, etc., some stocks being redeemed and the amounts reinvested in bank scrip and railroad bonds.

The judge at Special Term found that the investments were reputed at the time safe and desirable, were made in good faith, and the executors had invested their own funds in similar securities.

But he decided that the executors were bound to have invested the legacies in stocks of the United States or State of New York; that their actual investments were invalid, and that they were liable for the amount with compound interest, from the 26th of September, 1846 (one year from the death) at seven per cent. That the legatees must reject all or none of the investments. A reference was ordered to compute the amount, with directions hereafter particularly noticed.

The judgment being affirmed, the case was appealed. In the Court of Appeals it was held unanimously, that the investments in the canal company or railroad stocks or bonds were unjustifiable, and could not be allowed as credits.

The discretion given by the will did not change the rule. The executors had under it the same, and no more liberty than they would have had without it.

The Court expresses the opinion that a party may elect to take some of the investments, and reject others.

Four of the judges thought that trustees for minor

children must invest in Government securities or real estate, or they would be personally liable for a loss.

The important rules for taking the account declared in the opinion, are hereafter stated.

*Account—Interest—Mode of Stating an Account.*

The mode of stating an account with variations of debits and credits, and interest to be allowed, was declared by Chancellor Kent, in the case of Jackson *vs.* The State of Connecticut (1 John. Ch. Rep., 17.)

Where a party is chargeable with interest, and makes partial payments from time to time, the payment is first applied in discharge of the interest. If there is an excess, it goes in sinking so much of the principal, and interest is subsequently computed on the balance. If the payment is less than the interest, the excess of the latter is not to be treated as principal and carry interest, but that continues on the principal until the aggregate of credits is greater than the interest, when the surplus is applied to the principal.

It is obvious that to attain entire accuracy, a stop should be made in the account whenever there is an excess, however trifling. But the rule of the Court does not demand this. Lord Hardwick, who laid down the general rule, held, that the Master need not stop and apply at every small surplus beyond interest. (Gould *vs.* Tancred, 2 Atkyns, 533.)

In the case of Nestell *vs.* Nestell (May 17, 1820) the credits throughout the year repeatedly exceeded the interest due, sometimes considerably, at others but little. The Master, under the usual decree for an account, stated it with stoppages quarterly to deduct the excess.

Any rule on this subject must be governed by the

special circumstances, observing generally that if the excess is considerable the rest should be made, and if slight it need not be.

Accordingly it has been prescribed in cases, and adopted in practice, to make such a stoppage annually, or half-yearly, or even quarterly, with the qualification that if in the interval a large proportionate excess, appear, it should be at once applied.

In Stoughton *vs.* Lynch (2 John. Ch. Rep., 213), where the Master had stated partnership accounts upon the mercantile principle, the Chancellor supported it, on the ground of the settled usage of the parties. That mode is by computing interest on the debits and credits respectively to the close of the account, or other fixed period. He observed, that it was capable of mathematical demonstration that if the principal of a debt is left upon interest, and interest is computed upon payments as successively made, the whole debt will be extinguished in a series of years by payments of interest, without paying a cent of principal. In the Appendix to Hoffman's Masters in Chancery, p. 360, is a statement showing that a debt of $1,000 will in this way be wholly discharged in 21 years with interest at seven per cent.

In the Appendix No. 17 I have made statements showing the results of three modes of stating an account, upon the supposition of $100 due, and $50 paid at the end of six months, and $50 paid at the close of the year. By No. 1, if the interest is charged for the year, and then the credits given, the balance will be $7. By No. 2, applying the rule of Jackson *vs.* The State of Connecticut, $5.37 is due; and by No. 3, the mercantile method, the balance is $5.25.

The difference between the results of No. 1 and No. 2 is $1.63. That is, the debtor gains the interest on

$46.50 for 6 months, that amount of principal being sunk.

Between Nos. 2 and 3 the difference is $1.27 cents, which is the interest on $3.50 for six months, gained by the debtor.

In two cases in our Court of Chancery (Barrow *vs.* Rhinelander (29th September, 1815) and Ross *vs.* Ross (13th May, 1820), the course of application of excesses was adopted, where the decree had directed interest upon all the credits for money loaned or paid on account, and also interest on all the receipts; in each case from the time of payment or receipt.

The Master in Barrow *vs.* Rhinelander stated in one schedule all the debits he had allowed against the defendant (a confidential clerk), and in another all the credits given him. In another schedule he stated an interest account; and in his report observed, that he considered the several sums credited to the defendant in the nature of loans by him at interest, and the sums charged against him as payments thereon, until the period when he became a debtor to the complainant. From that period he considered the sums charged against him as moneys received, on which he was to pay interest, and the credits as payments thereon; and that in both cases he had applied the payments respectively, first, to discharge the interest, and the excess if any, in discharge of the principal.

An exception was taken, that he should have credited the defendant with interest on all the items of credit from their dates to the report, and with interest on the debits in the same manner. The exception was disallowed on argument, 7th December, 1818.

Of course, when a credit does not equal the interest, no stoppage in the account is necessary.

*Annual Rests.*

The meaning of the term annual rests, or *rests*, is the stoppage of an account annually, or at some other period, to ascertain the balance then due. Generally in England the direction for a Master to do this does not imply that he is to compute interest, much less to compound it, but that he may enable the Court the better to decide the question of interest. The Master may also do this, even if there is no clause in the decretal order to that effect. (4 Brown Parl. Cases, 553; Newton *vs.* Burnet, 1 Br. Ch. Rep., 359; Belts Ed.; Tibbs *vs.* Carpenter, 1 Mad. Rep., 293.)

But annual rests were often understood to mean and direct the computation of compound interest. So it was reported by Master Cox in the case of Raphael *vs.* Boehm (11 Vesey, 92).

In Tibbs *vs.* Carpenter (1 Mad. Rep. 295), a leading case, the bill was against executors. The Master set forth the balances annually in hand for a series of years. The Vice-Chancellor stated that one of the questions was as to interest upon these balances. He discussed the question fully whether the interest should be simple or compound, and determined it should be simple only.

In the case of King *vs.* Talbot (40 N. Y. Rep.), before noticed, the subject of the mode of accounting is largely considered. The judge at Special Term had decided that the executors account for the legacy with interest at 7 per cent. from the 26th of September, 1846 (one year from the death), and the interest to be compounded, etc. The account was to be taken with annual rests.

The referee in making up the account debited the plaintiff with the payments by the executors for maintenance, etc., during the year, with interest from the

date of each payment to the ensuing 26th of September, and commissions. He was then debited with the legacy and the interest at seven per cent. for the year. The balance thus struck was treated as a new principal.

The Court of Appeals modified the judgment in these particulars:

1. That the legacy was to bear interest from the death of the testator.

2. That such interest should be at six per cent., not seven.

3. That the account was to be taken with annual rests, by which we understand that interest was to be compounded, as directed at Special Term.

4. That if small amounts of surplus income remained on hand, interest should not be charged upon them.

If there was a surplus of income on hand when payments were made, no interest should be allowed on such payments.

The executors had no right to encroach upon the principal.

The directions in this case are of so much practical value that I have made, in the Appendix No, 18, statements from the *original* report in the printed case, as modified by the Court of Appeals.

It will appear from such statement that the advances for maintenance from the death of the testator to the end of the year was $1,065.80, interest being allowed on the several sums as advanced. At the end of the year (Sept. 26, 1846) the interest on the legacy is credited, $900, and the balance is $165.80. The account continues with slight variations between debits and credits until Sept. 26, 1851, when there is a balance on hand of $908.24, and the debits for 1852 are $306.56. Considering, however, what would probably be needed for that year, as governed by the charges in the pre-

ceding years, I have not treated any part of such amount as to be invested and to carry interest. But the amount of credits in 1852 would justify an investment of $1,000, and leave a balance of $451.98 for the payments of 1853, which were only $382.36.

So on the 26th of Sept., 1854, the amount on hand will call for an investment of $1,000, and leave a balance of $472.06. The debits of 1855 largely exceed this, and the interest on the advances is allowed by an average. In a re-statement after the decree it was allowed on the whole advances as made.

The account, down to Sept. 26, 1857, thus stated, leaves the sum of $161.79 in favor of the executor.

Then the result of the income account at such date is shown. In one statement the two investments are made to bear compound interest; in another simple interest only. The difference is $57.80.

It may be suggested whether the compounding is just, where the periods are so short as in this case. The principle of the rule seems to be that interest be compounded, because the party ought to have invested a surplus sufficiently large to call for it. But surely this could not be warranted for $60 at the end of a year, or $120 at the end of two years, or even $240 at the end of four. The allowing interest on the sum which should have been invested, seems the most equitable mode.

There are some details of computation which are useful in considering this subject. Compound interest at 7 per cent. will double a sum in ten years and about ninety days. In five years the gain is $5.24, averaging $1.05 per year; in ten years it is $26.66, averaging $2.66 per year. That is to say, compounding for 5 years is equivalent to $8.05 per cent. annually, and for ten years to $9.66 annually. Of course, if compound-

ing is taken as a substitute for profits from the employment of the funds in trade, the period is of the utmost importance.

*On Legacies.*

Where the will is silent as to the time of payment, or as to interest on a legacy, it is given as against Executors from the end of a year. (Gibson *vs.* Ross, 7 Vesey, 97; Wood *vs.* Penoyre, 13 Vesey, 333.) The rule is taken from the practice of the ecclesiastical courts, where a year is given to the executor to collect the effects, and he cannot be called upon to pay sooner. But if the will direct interest or income by way of maintenance, it is due from the estate from the death of the testator. (King *vs.* Talbot, 40 N. Y. Rep.)

Interest is payable upon a stated account, delivered and acquiesced in. (Barvel *vs.* Parker, 2 Ves. Sen. 364; Leotard *vs.* Graves, 3 Caines, 234.)

The rate of interest is often regulated by the law of the place of contract or payment, though differing from that where the suit is brought.

In Sir John Champant *vs.* Lord Ranelagh (Prec. in Chancery, 129) the defendant made his bond in England, but the money was to be paid in Ireland. The Lord Keeper thought it should bear Irish interest.

The same rule was declared in Ehins *vs.* The East India Company (1 P. Wm., 396), affirmed in the House of Lords (2 B. Pr. C., 72.)

A party is considered as contracting in that country in which he undertakes to pay. (*Huber's Prelectiones*, 2–5, Tit. 3; 2 Burrows, 1077.)

The rule in England is fully settled that interest shall not be allowed beyond the penalty of a bond in administering assets. (Clarke *vs.* Seton, 6 Vesey, 414, and Cases, 7.)

As between the parties it has been settled in our State, that interest may be charged beyond the penalty. (Smedes *vs.* Houghtaling, 3 Caines, 49.) But I have not found that as between creditors it has ever been done.

Where the bond is accompanied with a mortgage, such interest may be given. The mortgage is to secure payment not of the bond, but of the sum for which the bond is given. (Clarke *vs.* Abingdon, 17 Vesey, p. 107.)

*Commissions and Allowances.*

The former rule of refusing compensation to Trustees for their services has long been abolished. The commissions are now regulated by statute. (2 R. S., 93; Laws of 1863, chap. 362.) The rates are: Five per cent. on all sums received, and the same on all sums disbursed, on an amount not exceeding $1,000; two and one-half per cent. on all sums received, and the same on all sums disbursed, beyond $1,000 and not amounting to $10,000; and one per cent. on all sums exceeding $10,000.

The mode of allowing the commissions is as follows —say the sum of $12,000:

| | | | | | |
|---|---|---|---|---|---|
| 5 | per cent. | upon | 1,000 = | $50 | |
| 2½ | " | " | 9,000 = | 225 | |
| 1 | " | " | 2,000 = | 20 | |
| | | | | —— | $295 |

(See Appendix 19.)

The Court has been reluctant to refuse the commissions to an executor, even where he has been remiss or faulty in his conduct.

And in King *vs.* Talbot (40 N. Y., 96), where the executor had invested in railroad and other bonds and stocks, which the Court held to be unwarranted, and

directed interest to be allowed on the legacy annually at six per cent., yet the usual commissions were allowed.

If rests are directed or made in an account, with a view to the charge of interest, the commissions are first to be deducted from the balance. (Vanderheyden *vs.* Vanderheyden, 2 Paige, 287.)

## SECTION II.

### *Specific Question of Fact.*

A clause of the first subdivision of section 271 empowers the Court to order a reference (when the trial requires the examination of a long account on either side) of the whole issue, "*or to report upon any specific question of fact involved therein.*"

The reference under this subdivision of the whole issue has been before examined (Tit. I., chap. 2). We proceed to examine the clause above italicised.

In Bowman *vs.* Sheldon (1 Duer's Rep., 607), the action was by an attorney to recover for professional services, attorney's and counsel fees and disbursements in various actions. The Court declared that a reference might be had to ascertain the amount of compensation he would be entitled to, provided his right to recover should be afterwards established. The reference would be analogous to the practice on the taxation of costs between attorney and client, which only settles the amount and not the right to recover. The case was treated as one of a reference under this clause of the section, viz., as to a specific question of fact. All the judges concurred in this view.

In Ehlen *vs.* The Rutgers Fire Ins. Co. (6 Abbott's Rep., 681) the action was upon a policy of insurance, and an order of reference was made at Special Term to

ascertain and report the amount of any loss sustained by the plaintiff. The referee reported a certain sum. The case was then tried before a jury, proofs of the fire, etc., given, and the report read in evidence. The jury found for the plaintiff and for the amount reported; judgment was entered, and exceptions to the report, as well as other exceptions then taken. There was an appeal from the judgment to the General Term. It was held that the exceptions to the report could not be heard. They should have been taken before the report was used before the jury. A special motion could have been made.

In neither of these cases is it apparent that the examination of a long account was necessary, and this element is a pre-requisite for such an order as much as for a reference of the whole issue. The compensation of the attorney and counsel would depend upon the services proven and the valuation of witnesses as to them. The loss by the fire would be the enumeration of the goods injured and their value. This might involve a long or a brief account.

But in each case the reference was clearly proper under the second subdivision of the section, viz., *to take an account* for the information of the Court before judgment. It is not of a long account.

One case occurred in the author's experience, which seems peculiarly within this subdivision. The action was upon an attorney's bill for long services, numerous disbursements, advances for witnesses, as well as taxable costs. It was averred that an agreement had been made, by which a certain sum was received in full discharge up to the time. As to the residue of the claim, that the authority to act had been revoked; but if still in force, it was limited.

We presume that the words "any specific question of

fact" does not mean the referring the whole question of liability, apart from the question of the amount if liable. That would be to determine fact and law. It must be, we judge, some question contained in the issue, important to decide it, yet not all the issue.

For example, the questions in one case after an amendment, were, whether securities were pledged originally for certain notes, which it was contended were paid in full; and next, whether, by a subsequent agreement, the pledge was continued for indemnity as to other notes or demands. The first question was, it seems, easily settled. The latter may have required much examination and been proper for a reference.

For the practice under this subdivision we refer to the previous section. All that is pertinent to it will be there found, as well as much more. We presume that the 39th rule applies.

## SECTION III.

### *Questions of Fact other than upon Pleadings.*

The third subdivisiou of section 271 authorizes a reference "where a question of fact other than upon the pleadings shall arise upon motion or otherwise, in any stage of the action."

In Flagg *vs.* Munger (3 Barbonr Rep., 9), the Court explains this provision. This was undoubtedly intended to provide for references in cases where questions of fact should arise, upon collateral matters in the cause, in any stage of it, and not matters of fact made by the pleadings. Such as whether an injunction has been violated, or a party is in contempt, and numerous questions on motions.

In Dennett *vs.* Leonard (19 Howard, 140) there was a motion to set aside a judgment had against a lunatic

before the inquisition, but covered by the time found by the inquest when he became such. The Court held that since the general jurisdiction over lunatics had been vested in it, both at law and in equity, it could set aside a judgment on the motion of the committee. The questions of fact, arising on such a motion, could be sent to a referee for examination and report.

In Meyer *vs.* Lent (16 Barbour, 539) a judgment was alleged to have been paid, and satisfaction of it was refused. The Court say, that the practice of granting relief on affidavit and motion, had been introduced instead of the old writ of *audita querela.* A feigned issue might be ordered. But the third subdivision of section 271 was applicable, and a reference could be directed.

In Marshall *vs.* Smith (20 N. Y., 259) a reference was ordered to ascertain the liens upon surplus moneys on a foreclosure and sale, and their priorities. The referee reported, and an order for the distribution was made accordingly. The order was affirmed at General Term. No exceptions had been filed. On appeal to the Court of Appeals it was held that there could be no review of questions of fact in that court, when the reference was under subdivision three. Error in the proceedings must be brought up by exceptions.

In Barrow *vs.* Sanford, (14 Howard, 443) there was a motion to discharge an arrest. It had been granted on allegations of fraudulent representations by defendant upon a purchase of goods, as to his property and means. The affidavits were conflicting and equally positive on each side. The Court said: Where there is such a conflict in the affidavits, it will be safest, and subserve the rights of suitors and public justice, to refer the affidavits to a referee, and require the parties

to submit to an oral cross-examination in respect to the facts stated in the affidavits, with leave to either party to call and examine other witnesses on the question. The order was: "That the referee report the evidence, and his finding thereon, whether the debt was or was not fraudulently contracted."

We apprehend that the course of practice before the referee is the same as that stated under the last section. The report is to be made, and exceptions taken in like manner. This is particularly the case where (as we often find) the referee is to report his opinion or decision upon the matter, or even to report the facts with the evidence. The facts are the deductions of the referee from the evidence.

For an order and report, see Appendix Nos. 20 and 21.

# CHAPTER II.

## UNDER SECTIONS OTHER THAN § 271.

### *Section* 1 *Under Section* 246.

The 246th section of the Code, after providing for the course of proceeding in an action for the recovery of money only where no answer has been received, has the following:

"In other actions the plaintiff may upon the like proof" (of service and no answer) "apply to the Court, after the expiration of the time for answering, for the relief demanded in the complaint. If the taking of an account or proof of any fact be necessary to enable the Court to give judgment, or to carry the judgment into effect, the Court may take the account or hear the proofs; or may, in its discretion, order a reference for that purpose.

"And when the action is for the recovery of money only, or of specific real or personal property with damages for the withholding thereof, the Court may order the damages to be assessed by a jury; or if the examination of a long account be involved, by a reference as above provided." (Subd. 2.)

By the 33d rule, "When the plaintiff in the action is entitled to judgment upon the failure of the defendant to answer the complaint, and the relief demanded requires application to be made to the Court, such application may be made at any special term, in the district embracing the County in which the action is triable, or in an adjoining County. Such application may also be made at a Circuit Court in the County in which the action is triable.

"But when a reference or writ of inquiry shall be ordered, the same shall be executed in the County in which the action is triable, unless the Court shall otherwise order."

In an action for the recovery of money only, a referee was appointed to assess the damages. A judgment entered upon his report was set aside. In such a case this could only be done when the examination of a long account was necessary. The action was for assault and battery. (Boyce *vs.* Comstock, 1 Code Rep. N. S., 290.)

In Horn *vs.* Doody (4 Duer, 670) it was also held that the regular course was an assessment by a Sheriff's jury, unless an account was necessary. The action was one of claim and delivery, with damages for detention. The case of Hewitt *vs.* Howell, 8 Howard, 346, is to the same effect.

In equity cases the assessment of damages must be by a referee or the Court. One by a sheriff's jury is null. (Kreitz *vs.* Frost, 55 Barb., 474.)

In that case it was held, that in an equity case, if the Court required information on any subject, it sent the case to a court of common law, on a feigned issue to be submitted to a jury, at *nisi prius*. But the practice prior to the Code, requiring the clerk to assess the damages in default in certain cases, and in all others to be assessed by a sheriff's jury, was substantially continued by the Code. But if the taking of an account, or the proof of any fact was necessary, the Court might order a reference for that purpose.

The authorities under the Code do not definitely settle when or in what cases a party who has appeared, but not answered, should have notice upon the reference. By the chancery practice, if there was no

appearance, the party was not entitled to a notice. But it was otherwise if he had appeared. In Hart *vs.* Small (4 Paige, 551), the Chancellor decided, that if a party appeared by a solicitor and then allowed the bill to be taken as confessed for want of an answer, he was still entitled to notice of all the proceedings.

In Hoffman's Masters in Chancery, Page 3, it is stated that the custom prevailed, of serving a summons upon a party who had appeared and not answered. The defendant might admit all the allegations of the bill to be true, and yet have an interest in the taking the account which resulted from them.

In Kelsey *vs.* Strong (6 Abbott, 386 *N.*) there was an appearance and no answer. The case was within the 2d clause of section 246, and notice of the assessment upon a writ of inquiry was proper. The former rule, the 21st of 1847, was applicable, and not superseded.

## SECTION II.

### *Under Sections* 296 *and* 300.

The provisions of the Code under the title of proceedings, suplementary to the execution, are found in sections 292, etc. They are the substitutes of the former creditors' bills, and are to be regarded as of the same character as such equity actions. The practice under such bills may be pursued when not varied by the Code. (Orr's Case, 2 Abbott, 457; Myer's Case, *Ibid* 476; Fitch *vs.* Meade, 29 Howard, 360.)

By section 296, the party or witness may be required to attend before the judge, or before a referee appointed by the Court or judge. All examinations

and answers before a judge, or referee, under this chapter shall be on oath, except that when a corporation answers, the answer shall be on the oath of an officer.

There are provisions in the first clause of section 292 applicable to such reference and to be noticed. On an examination either party may examine witnesses on his behalf, and the judgment debtor may be examined in the same manner as a witness.

"No person shall, in an examination pursuant to this chapter, be excused from answering any question on the ground that his examination will tend to convict him of the commission of a fraud; but his answer shall not be used as evidence against him in any criminal proceedings or prosecution. Nor shall he be excused from answering any question on the ground that he has, before the examination, executed any conveyance, assignment or transfer of his property for any purpose, but his answer shall not be used as evidence against him in any criminal proceeding or prosecution."

The proceeding as it relates to a third party may be regarded as in the nature of a new action; but as to the *debtor* himself, it is a remedy in the action, to end it by obtaining satisfaction. (See Driggs *vs.* Williams, 15 Abbott, 477; Holstein *vs.* Hill, *Ibid* 307.)

For the form of an order, see Appendix No. 22.

The referee may adjourn the examination. There should not be an application to the Court. (Mason *vs.* Lee, 23 Howard, 466; and see 26 Howard, 57.)

Where the referee was absent at the time appointed for the debtor to appear, he might perhaps appoint another time, or the Court could be applied to for his removal, and to appoint another. (Allen *vs.* Stowing, 26 How., 57.)

For the form of a report, see Appendix No. 23.

When the examination before the referee is closed, it cannot be opened except by an order of the judge.

In Orr's case (2 Abbott, 457), the examination had been had before a referee, and was as full as the party required. The referee declined to enter upon a further examination, and his decision was supported.

The object and scope of the inquiry is, whether the debtor possesses any and what property, which may be applied towards satisfaction of the judgment.

In Hunt *vs.* Enoch (6 Abbott, 212) it was held that the debtor could not be required to answer any questions, which do not tend to show possession of or title to property, which may be ordered to be applied in satisfaction. It is not sufficient that the defendant answer generally that he has no property; the plaintiff may prosecute his inquiry notwithstanding. If the defendant is in possession of any property the plaintiff may ask when and where, and how he obtained possession, and on what terms he holds it. (Le Roy *vs.* Halsey, 1 Duer, 589.)

Proceedings may be taken under section 294 to call upon an alleged debtor without proceeding under section 292. (Gibson *vs.* Haggerty, 37 N. Y., 555.)

A witness to whom property of the debtor is alleged to have been transferred is bound to answer all questions respecting such transfer, bearing upon the question whether it was fraudulent, or for a good consideration. Upon refusal to answer he will be punished as for a contempt. (Lathrop *vs.* Clapp, 40 N. Y. Rep., 328.) And in Forbes *vs.* Willard (54 Barbour, 520) it was held that the creditor had complete authority for a full and searching examination of the debtor to ascertain his property, and the disposition he has made, or attempted, of it. If the denial of the debt is positive, or the assertion of the right to the property absolute,

the inquiry must cease. An action by the receiver is the course. (Westside Bank *vs.* Pugsley, Ct. of Appeals, 12 Abbott, N. S., 28.)

The referee does not punish for a refusal to be examined, or to answer questions. Application on affidavits should be made to the Court. (40 N. Y. Rep., 328.) The proceedings are regulated by section 292 of the Code, and not restricted by section 299.

By section 300, the judge may, in his discretion, order a reference to a referee agreed upon by the parties, or appointed by him, to report the evidence or the facts, and may, in his discretion, appoint such referee in the first order, or at any time.

This is presumed to apply to cases arising under section 299; where it appears that a person or corporation, alleged to have property of the judgment debtor or indebted to him, claims an adverse interest in the property or denies the debt, the property or debt shall be only recoverable in an action by a receiver, but a transfer may be forbidden.

The referee is appointed *ex parte.* (Green *vs.* Ballard, 8 Howard, 314.)

The referee may not grant an indefinite postponement without consent of the defendant. He is bound to proceed with diligence. (Hudson *vs.* Retz, 11 Paige, 180.)

The language of the section is, that he is to report the *evidence or the facts.* If the latter is directed, he should not report the evidence merely. (Dow *vs.* Naxon, 5 Howard, 59.)

The referee has no power to punish the party or witness for non-appearance or other disobedience. He is to certify the matter to the judge.

In Green *vs.* Ballard (8 Howard, 313) it was decided that an order appointing a referee may be made at the

same time as the order for examination. The judge who made the appointment is the judge to whom the report is to be made, as well as any application during the examination. (Smith *vs.* Johnson, 7 Howard's Pr. Rep., 339.)

In the case of Dickerson *vs.* Van Tine (1 Sandford's Rep., 724) the proceedings by a receiver, under the direction of a referee to obtain property of the debtor, are minutely stated. The referee is to specify the property to be taken, and the mode and time for its delivery.

The disobedience of a party or a witness of an order made by the judge or referee, may be punished by the judge as for a contempt. (§ 302.) In Lathrop *vs.* Clapp (40 N. Y., 328), the proceeding was much discussed, and it was among other things ruled, that it was sufficient when a witness or party refused to answer, that he be present when the referee orders him to answer.

It seems the better opinion, that the judge who made the order, is the judge who alone has the authority to punish for a disobedience. (Wicker *vs.* Draper, 34 Barbour, 353; Shepherd *vs.* Dean, 13 Howard, 173; *contra* Dresser *vs.* Van Pelt, 15 Howard, 19; 6 Duer, 687.)

SECTION III.

*Under Section* 401.

"When any party intends to make or oppose a motion in a Court of Record, and it shall be necessary for him to have the affidavit of any person who shall have refused to make the same, the Court may by order appoint a referee to take the affidavit or deposition of such person. Such person may be subpœnaed and compelled to attend and make an affidavit before such referee, the same as before a referee to whom it is

referred to try an issue. And the fees of the referee for such service shall be three dollars per day."

The usual practice is to prepare and offer the proposed affidavit to the witness. He is entitled to know what is wished of him, as his consent or refusal may depend upon its particular contents. But frequently the witness, from his relations with the party or other reasons, declines to make any affidavit. This will be sufficient to obtain the order.

Notice of the motion need not be given. The adverse party is not entitled to take part in examination. (3 Abbott, N. S., 124; Ericle *vs.* Chamberlain, 35 Howard, 73.)

The affidavit of the attorney is in general sufficient to obtain the order. It should state the ground on which the affidavit is necessary, how it bears upon the question raised, the refusal to make it, and that it is to be used upon a motion designed to be made. (Moses *vs.* Banker, 7 Roberts, 131; Fisk *vs.* Chicago R. R. Co., 3 Abbott N. S., 430.)

The proposed deponent may move to set the order aside, but the adverse party cannot. (Ramsey *vs.* Gold, 39 Howard, 62.)

If the affidavit as exhibited to the witness before the referee is not agreed to by him, he may be examined, and must answer all proper questions put to him, or he may be punished for a contempt.

In Clark *vs.* Brooks (26 Howard, 256) the Court affirmed the power of a judge to direct an attachment, upon a refusal to answer proper questions.

The question as to the right to examine a party to the action under section 401 came before Judge Cardoza in Fisk *vs.* The Chicago R. R. Co. (3 Abbott N. S., 430), who held that such a right existed. Judge Barrett, in Hedkin *vs.* The Atlantic R. R. Co. (5 Ab

bott N. S., 73), held the contrary. In Knoepel *vs.* The King's County Fire Ins. Co., July, 1874, Judge Spier, of the Superior Court, examined the question carefully, and agreed with Judge Barrett that it could not be done.

The 389th section was considered to be decisive of the question; and the right to examine and course of proceeding were to be regulated by the subsequent sections of the sixth chapter.

The appearance of the proposed deponent before the referee and his submission to be examined cures any irregularity. (Cue *vs.* Tribune Ass., 3 N. Y. Supreme Ct. Rep., 451.)

In that case it was also held that the adverse party could not move to set the order aside, but might raise any proper objection when the affidavit was offered to be read.

The preferable course, when the deponent does not agree to an affidavit as drawn is to take the questions and answers in writing. In some simple cases, the statement of the witness has been taken by the referee from his own lips, the matter, to which he is asked to depose, being suggested by counsel.

The affidavit being signed and attested, the referee annexes to it a certificate that it was taken before him on the day of its date, pursuant to the order. This is filed, and, of course, no confirmation is needed.

For the Forms on this proceeding see Appendix No. 24.

## SECTION IV.

### *Under Sections 222–224. Injunction Cases.*

"Where no provision is made by statute as to security upon an injunction, the Court or Judge shall require a written undertaking on the part of the plaintiff, with or without sureties, to the effect that the plaintiff

will pay to the party enjoined such damages, not to exceed an amount specified, as he may sustain by reason of the injunction, if the Court shall finally decide that the plaintiff was not entitled thereto. The damages may be ascertained by a reference or otherwise as the Court shall direct." (Section 222.)

The language of Section 224, as to an injunction, restraining a Corporation from acting, is identical.

The reference to assess damages cannot be had until there is a final judgment in the action.

Thus, in Weeks *vs.* Southwick (12 Howard, 170) an injunction to stay waste had been allowed, and a motion to dissolve it on the pleadings had been granted. The case was referred to hear and determine, and the referee reported, dismissing the complaint with costs; but judgment on the report had not been entered. The defendants moved for a reference to ascertain damages. This was held to be premature. There must be a final judgment determining that the plaintiff was not entitled to the injunction.

And in Shearman *vs.* The New York Central Mills Co. (11 Howard, 209) it was ruled: *First*, that the *Court* must decide that the plaintiff was not entitled to the order; *next*, that there must be a final decision made at the termination of the cause, by a judgment therein, or by a voluntary discontinuance of the suit; *lastly*, that the plaintiff was not entitled to the order at the time he obtained it.

Though an injunction is dissolved before hearing, it by no means follows that the party may not be entitled to the relief, at the final decision of the cause. In most cases, if not in all, a reference before judgment to ascertain damages, would be premature. (The Methodist Churches of New York *vs.* Barker, 18 N. Y. Rep., 463.)

The dissolution of the injunction on motion, and the subsequent discontinuance of the action by the plaintiff, and payment of costs, warrant an order of reference to ascertain damages. (Carpenter *vs.* Wright, 4 Bosworth, 655.)

In The Pacific Mail Co. *vs.* Lewling (7 Abbott N.S., 37) the plaintiff had himself vacated the order for an injunction and discontinued the suit. The order for a reference was made.

It is free from doubt that all costs and Counsel fees resulting from, and attendant upon the injunction, with the Referee's fees, may be assessed as damages. (Strong *vs.* DeForest, 15 Abbott, 427; Fitzpatrick *vs.* Flagg, 12 Abbott, 189; Edwards *vs.* Bodine, 11 Paige, 223.)

In Corcoran *vs.* Judson (24 N. Y. R., 106) the bond, given upon obtaining an injunction, was held broad enough to cover an allowance for counsel fees in the suit generally. An award had been made under an Act of Congress to a party. Another claimed to be entitled to a large portion of it, and obtained an injunction restraining the payment of the amount pursuant to the award. The bond with sureties was, that he would pay all costs and damages, arising from his claim, or from his contesting payment to the defendant. The Bill was finally dismissed with costs.

The Judge at the trial found that the defendant was entitled by way of damages, to his interest, the fund having been unproductive; to taxable costs in the action, and to $1,500 counsel fees in the cause, which sum he adjudged to be reasonable allowance. This was affirmed at General Term, and by the Court of Appeals; in the latter court by five Judges against three dissenting.

The very broad language of the bond was noticed. It differed from the bond under the rule of the Court

of Chancery, which was like the present provision, viz. : "as he may sustain by reason of the injunction."

Here it was "all damages accruing from his claiming the fund and contesting the right of the party enjoined."

We cannot safely conclude from this case, that under the undertaking of the Code, counsel fees in the suit for general services can be allowed. The rule still seems to be that they must be such as arise, because of and connected with the injunction ; for services which would not have been needed, if none had been granted. This was declared to be the rule by the General Term of the Superior Court in Wilde *vs.* Joel (15 Howard, 320). See also Strong *vs.* DeForest (15 Abbott, 427).

Counsel fees for which a party is legally responsible may be allowed, although unpaid. (Wilde *vs* Joel, *ut supra.*)

In Barton *vs.* Fish (30 N. Y. R., 166) the injunction restrained the defendant from taking and using certain property. The plaintiff during the suit carried it away, and appropriated it to his own use. The value of the property was allowed for damages upon the injunction being dissolved.

We deem the best warranted conclusion to be, that the report of damages under a reference settles the question of the *quantum* of damages, as to the sureties in the undertaking, as well as to the principal. The contract they enter into is not merely that they will pay the damages sustained, but that they may be in this manner ascertained. Even if this clause is not contained in the undertaking, the law would treat it as inserted. But the propriety, if not necessity, of giving notice to the sureties is clear (Wilde *vs.* Joel, 15 Howard, 320 ; Kelly *vs.* Lockwood, 1 Georgia Rep., 72, there

cited; Methodist Churches *vs.* Barker, 18 N. Y. Rep., 463). The sureties might have the report sent back, upon making a case to justify it.

For the Forms of an Affidavit, Order, and Report, see Appendix Nos. 25, 26, and 27.

SECTION V.

*Under Section* 72 *and Rule* 40 *of the Supreme Court.*

By the 40th Rule of the Supreme Court, in cases in which the trial of issues of fact is not provided for in Section 253 of the Code, if either party shall desire a trial by jury, such party shall, within ten days after issue joined, give notice of a special motion to be made upon the pleadings, that the whole issue or any specific question of fact involved therein, be so tried. A copy of the questions of fact proposed to be tried shall be served with the notice, and in proper form to be incorporated in the order.

The Court or Judge may settle the issues, or refer it to a referee to settle the same. Such issues must be settled in the form prescribed by Section 72 of the Code.

Section 72 abolished feigned issues, and provided, that in the cases where the power now exists to order a feigned issue, or where a question of fact not put in issue by the pleadings is to be tried by a jury, an order for trial may be made stating distinctly and plainly the question of fact to be tried, and such order shall be the only authority necessary for a trial.

This course is adopted substantially from the Chancery Practice. That Court often sent issues as to special matters to be tried by a jury.

Section 254 prescribes that every other issue (other than in the three cases specified in Section 253) is triable by the Court, which, however, may order the

whole issue, or any specific question of fact involved therein, to be tried by a jury.

The language "where the power now exists to order a feigned issue," etc., refers, no doubt, mainly to the cases in which a Court of Chancery could direct such an issue. The rule of that Court is stated by Baron Vaughon in Bree *vs.* Beck (1 Younge's Rep., 263): "This is an issue directed by my Lord Chief Baron for the purpose of satisfying his conscience, and with a view of assisting him in administering that relief in equity to which the parties may appear entitled.

"I take it to be clear, that it was competent for the Chief Baron to have assumed to himself the determination of every matter of fact suggested by the record."

In Townsend *vs.* Green (3 Paige, 457) the Chancellor said: "A jury is directed only in those cases where there is a want of evidence, or the testimony is contradictory, or so nearly balanced that it is necessary to have an open and rigid cross-examination before a jury who are to try the question of fact. (See also Thompson *vs.* Thompson, 3 Ves. & Bea., 42, and Sherwin *vs.* Lewis, 3 Merivale, 167, N.)

The Court of Chancery granted issues always, where the validity of a will was in question, and the heir desired it (11 Vesey, 63; 1 McClelland, 424). So, upon a question of the genuineness of an instrument (1 Russell, 559); or a question of partnership (2 Turner's Pract., 180; Trouthick *vs.* Trew).

In Seymour *vs.* Delancey (1 Hopkins, 449) the bill was for a specific performance of a contract for the sale of lands; and upon a question of title, one of the deeds produced was questioned, by the testimony taken before a Master. It was held to be a proper case for an issue, which was ordered.

In Paul *vs.* Purshall (14 Abbott N. S., 138) the original power of the Court of Chancery as to awarding issues—the Act of 1838, ch. 258—and the Act of 1839, ch. 317, repealing the latter, are discussed. The last Statute left it in the power of the Chancellor to award an issue and prescribe the manner of proceeding, in cases which he might deem proper to submit to a jury. The 69th rule of the Court was then changed.

It was competent for the Court upon the trial to award an issue for the determination of any question.

And the practice under the Code is substantially the same as before. The 40th rule has not enlarged or restricted the discretion of the Court in the matter. Church *vs.* Freeman (16 Howard, 294) is cited: "Issues of fact, in a common law action, must be tried by a jury, unless the parties waive that right. But it is for the Court to say in other cases whether an issue of fact shall be tried by a jury, or by the Court without one."

In the Mechanics' Bank *vs.* Joslyn (37 N. Y. Rep., 353) the action was to foreclose a mortgage given as security for commercial paper on which the party was liable, and held by the plaintiffs. The defense was usury. An issue was directed at Special Term. Upon the trial, the judge allowed other issues to be presented to the jury. They involved no change in the form of the action or in the nature and substance of the claim. They were material to a final adjudication, and the defendants were not taken by surprise. The Court also allowed an amendment of the complaint to conform to the proofs in the new issues.

The notice of an application for an issue is for the Special Term. Ten days' service of the notice is directed, and the issues proposed are to be specified in it. It is obvious that in most cases such issues can be settled

without a reference, as where the question is one of a partnership merely, or the genuineness of a document.

For the Forms of an Order and of Issues, and Report, see Appendix Nos. 28, 29, and 30.

We believe that the framing of issues for trial by a jury is now of rare occurrence. This is fortunate for suitors. The trial by the Court is infinitely better calculated for a prompt examination and a wise decision.

## SECTION VI.

### *Miscellaneous Cases.*

There are some cases which cannot be strictly arranged under any particular section of the Code, authorizing them, yet are consistent with it. They arise in suits of an equity nature generally; and some points of practice are peculiar to them.

There are cases in which the order merely directs the taking of the proofs, and reporting them to the Court.

In Swift *vs.* Wylie (5 Robertson, 680) the reference was to take testimony and make a decision on a motion to vacate an order of arrest. The Chief-Justice (Robertson) discussed the question, whether under the Code a reference could be made to hear and determine a motion, as well as all the issues, and with a strong impression that the power exists. It was held that no exception was necessary to the report of a referee, except where an error occurs in his determination of a matter of fact. It is to be confirmed on a hearing upon, or without exceptions, according as the report is of facts only, or a decision upon them also.

In Scott *vs.* Williams (23 Howard, 393) the referee was directed to take the testimony in an action in which an order of arrest had been made. It was held that he

was to take all the evidence offered; that he could not pass upon any objections taken to its admissibility, but was to leave all such questions to the Court.

So in Fox *vs.* Mayer (54 N. Y., 105) the action was to set aside a conveyance, as made in fraud, to defeat a judgment in favor of the plaintiff. A reference was ordered to hear and report the evidence. Such report was made. The cause was then tried at Special Term; and the judge found the facts to be substantially as alleged in the complaint, and that the judgment was a prior valid lien. The General Term affirmed such judgment, and an appeal was had to the Court of Appeals.

Several objections had been made before the referee, as to the admission of testimony.

It was held that the referee had no power to pass upon them; and as they had not been renewed upon the trial, nor passed upon there, they could not be noticed in the Court of Appeals.

The 122d section of the Code authorizes a defendant, where another person not a party makes a demand upon him for the same debt or property, to apply for an order to substitute such person, and discharge himself. This is a substitute for the Bill of Interpleader of the former practice.

In Kirby *vs.* Fitzpatrick (18 N. Y., 484) there was an order of reference to ascertain who was entitled to the surplus money arising from the sale of mortgaged premises by advertisements and in the hands of the mortgagee. Judgment creditors, having conflicting claims upon the surplus, brought actions against him. He applied under section 122, and was discharged. A reference was ordered in the two actions brought against him, and that upon the coming in of the report such further order should be made as might be just.

The referee reported the facts and his opinion. The Court at Special Term ordered payment to Kirby, plaintiff in one of the suits.

The Delaware Company, the plaintiff in the other suit, appealed. The order was affirmed at General Term. On appeal to the Court of Appeals it was held, that the reference was one falling under the third clause of section 271 of the Code, "Where a question of fact, other than upon the pleadings, shall arise upon motion or otherwise."

The course taken was analogous to that in interpleader suits. The order was equivalent to a judgment, and the Court could examine the case on an appeal without any exception.

By a clause of section 272, when the reference is to report the facts, "the report shall have the effect of a special verdict." A special verdict is that by which the jury find the facts only, leaving the judgment to the Court. (Code, § 260.)

In these cases the referee takes the testimony, with the signature of the witnesses to their evidence, and merely reports that he had taken the proofs as directed by the order, and that they are annexed to his report. The report is filed, and either party produces the evidence before the Court upon the subsequent proceeding.

# TITLE III.

## IN PARTICULAR ACTIONS, ETC.

## MARRIAGE.

### CHAPTER I.

#### DIVORCE FOR ADULTERY.

§ 1. Jnrisdiction.
§ 2. Waiver of Jury Trial. Consent to Refer.
§ 3. Defences in Bar.
§ 4. Legitimacy of Children Questioned.
§ 5. Selection of Referee.
§ 6. Proceedings and Rules upon Reference.
§ 7. Proofs.
§ 8. Confessions.
§ 9. Bars to the Relief.
(A) Connivance.
(B) Condonation.
(C) Lapse of Five Years.
(D) Recrimination.
§ 10. Upon the Allegation of Illegitimacy.
§ 11. On Failure to Answer, or non-Denial.

#### SECTION I.

*Jurisdiction.*

(*a*) *Inhabitancy*—The first clause of section 36 of the Statute gives jurisdiction where the husband and wife are inhabitants of the State at the time of the commission of the offence.

This is the only requisite. A removal from the State after the commission would not take away the

jurisdiction. Then the question is, What constitutes inhabitation?

If the parties are inhabitants, the Court has power, although the offence was committed out of the State.

It is clear that merely being within the State, at the time, is not all that is necessary. There must be the *animus manendi*, the regarding it as a permanent residence.

Williamson *vs.* Parisien (1 John. C. R., 392) settled this to be the rule. It is equally clear that a temporary absence with a plain intent to return, and evidence of the State being still considered the home, will leave the parties inhabitants. Hence the legal phrase domicile may afford some guide.

The leading authority upon this point is Somerville *vs.* Somerville (5 Vesey Tr., 750). One rule there declared is that the original domicile, or the *forum originis*, is to prevail, until the party has manifested his intention of abandoning his former, and taking another as his sole domicile. The domicile of origin is not that of birth. The accident of birth in a particular place does not affect the domicile. That of an infant is that of his father. *Next*, that the domicile of origin continues during pupilage. No new domicile can be acquired until a person is *sui juris*. (*Ex parte* Dawson, 3 Bradford, 130.) What shall amount to a manifestation of an intent to take another domicile is necessarily a matter of uncertainty. The Master of the Rolls applauds Bynkershoek for not hazarding a definition, and treats that of the Civil Law as vague. That definition as quoted in the case is: *Ubi quis larem rerumque ac fortunarum suarum summam constituit.* The rest of the passage is: *Unde rursus non sit discessurus si nil avocet; unde cum profectus est peregrinari vi-*

*detur : quo si rediit, peregrinari jam destitit.* (Domat's Civil Law, p. 484.)

In Moore *vs.* Durell (4 Hagg Rep., 346) the deceased, the son of a British subject, was born and educated in Spain, established himself as a merchant, and died there. He had resided for some years in Ireland, and had purchased property there. He had occasionally visited England, and sometimes claimed the privileges of an English subject. It was held that his domicile was clearly in Spain, and the succession to his property was governed by its laws.

Mere residence does not make a domicile. It must depend upon other circumstances. (*Ibid.*)

The word "inhabitant" is derived from the Latin *inhabitatio*, *habitatio*, and the cognate *incola*, and the general interpretation is dwelling-place, abode, the house. (Forcellini's Dictionary.)

We cannot reject from the sense the fact of general personal residence, though not always an unbroken one. But we can scarcely adopt the meaning of *domicile* in its ample sense as the test. If so, then where a domicile (of birth, for example) was clearly New York, and when the man was abroad for many years engaged in trade, married abroad, and the crime was committed abroad, he could sustain the action upon coming to New York. Certainly this would be a doubtful case at least.

In Sherwood *vs.* Judd (3 Bradford Rep., 267) the subject was carefully examined by that able Judge, Surrogate Bradford. The intestate was born in Connecticut. After attaining full age, he pursued the calling of a mariner, sailing from and returning to New York, and sometimes visiting his native place. He married in the City of New York, kept a house there for several years, and all his business was done there.

After his wife's death he rented a room there, so as to have a home, and paid rent, whether he was at sea or in port. He had taken an oath also, on becoming the owner of a vessel, that his present place of abode or residence was New York. This was in 1852, it seems, about a year before his death. It was held that his domicile at his death was New York, so as to regulate the rights to his personal property.

We apprehend that this case would have been within the provision of the Statute we are discussing. New York was the place where he resided when at home. When he was elsewhere, he was abroad—*peregrinari videtur*.

When the husband is complainant, the wife's inhabitancy must be governed by his. She must be an inhabitant if he is such. But when she brings the suit, the 57th section governs, and if she is a resident of the State she shall be deemed an inhabitant, although the husband resides elsewhere.

In Udney *vs.* Udney (Law Journal of 1872, Vol. 41, p. 74) the criterion is stated to be the selection of a particular place as the party's home for an indefinite period. It must not be a residence compelled by duties of an office, the demands of creditors, or other special causes not permanent in their nature.

(*B*)—The next clause of the Statute confers jurisdiction where the marriage has been solemnized or taken place within this State, and the injured party at the time of the commission of the offence, and at the time of exhibiting the bill of complaint, shall be an actual inhabitant of this State.

If the requisitions of this clause are met, the offence if committed elsewhere gives jurisdiction.

Here, also, the 57th section interprets the term "ac-

tual inhabitant" where the wife sues. Mere residence is sufficient. By the Act of 1813 (2 R. L., 197, § 10) her being an inhabitant of the State was to be determined by *the fact of her abiding in it.*

The same act used the terms *actual resident* instead of *actual inhabitant.* We may doubt, therefore, whether a wife could come from a settled place of abode elsewhere, and reside here transiently, for the purpose of getting a divorce, even when the marriage had taken place in the State of New York.

In Williamson *vs.* Parisien (1 John. Ch. Rep., 392) where the marriage had taken place in New York, the husband was absent eight years, when the wife married and continued in the marriage state to the filing of the bill. The husband had a house of trade in Jamaica, where he resided. He had been in New York a few months before filing the bill. The Chancellor said: "The party suing for a divorce must have become an inhabitant and taken up his residence here, with a *bona fide* and permanent intent. There must be the *animus manendi*, or a train of conduct and acts showing an intended settlement here. I find sufficient reason for dismissing the bill simply on the ground of a want of domicile here at the commencement of the suit."

(*C*)—The Statute provides, also, that a divorce may be decreed, where the offence has been committed in this State, and the injured party, at the time of the exhibiting the bill of complaint, is an actual inhabitant of this State.

Here again, where the wife is the plaintiff, the 57th section will apply and her residence be sufficient.

Where the husband sues, the remarks under the preceding clause will be pertinent.

We may question whether the case of Mix *vs.* Mix

(1 John. Ch. Rep., 204) would, since the Revised Statutes, be deemed law.

The plaintiff, the wife, was married in England, of which kingdom she was a native. The bill alleged that the defendant was an inhabitant of the State of New York at such marriage. He returned to New York, and she followed him. That he had committed adultery with J. H. of the City of New York. The Chancellor declared that it must appear both parties were inhabitants at the time of the commission of the act; but this was not averred as to the defendant.

It might, we presume, be now properly held that the allegation of being an inhabitant of New York at the date of the marriage warranted the presumption of his continuing such at the time of the offence, at least on demurrer.

## SECTION II.

### *Waiver of Jury Trial and Consent to Refer.*

We have before noticed (*ante*, Title I., chap. iii.) that under section 253 of the Code an issue of fact in an action for a divorce on the ground of adultery must be tried by a jury, unless such trial is waived, or a reference ordered. Our conclusions were:

That there must be, first, an express stipulation signed by the parties, or their attorneys, filed with the clerk of the court, waiving a jury trial, or some other explicit waiver, as specified in the 266th section. Next, that a reference could then only be had by consent under section 271.

This also should be in writing be signed in the same manner, and also filed.

The case of Waterman *vs.* Waterman (37 Howard, 36), and the other cases cited, undoubtedly support an

exception where a consent is given to an order in open court, though given orally; but certainly, in a case of jurisdiction specially delegated, a precise adherence to the letter of the law is at least expedient.

The two stipulations or consents may be comprised in one paper. (See Appendix No. 31.)

The waiver of a jury trial under section 266 must in this action have the consent of the Court. The recital of such consent in an order made at Special Term, upon filing the consents to waive and refer, will be sufficient.

It is important to advert to the case of Simmons *vs.* Simmons (3 Robertson's R., 642). The Court held that an action for divorce on account of adultery could not be referred even by consent. It was by the wife against the husband. It appears from the report of the case in 2 Robertson, 712, that no answer had been put in, and we presume this was the case when this decision was made. If it cannot be so understood, the decisions in Waterman *vs.* Waterman before cited, and of Diddell *vs.* Diddell (3 Abbott's Pr. Rep., 167) clearly establish a different rule.

The case of Diddell *vs.* Diddell (3 Abb. Pr. Rep., 167) was one where an order in such a case (the charge being denied) to take proofs and report was held to be irregular, and set aside. An order to hear and determine was then entered upon a stipulation to waive, and consent to refer, such as is above suggested.

In Lincoln *vs.* Lincoln (6 Roberts Rep., 525), in an action to annul on the ground of a former marriage, the defendant denied her previous marriage. The Court held that the cause could be referred by consent, but it should have been to hear and determine the issues, not to take proofs and report.

SECTION III.

By the 90th rule, the defendant in an answer may set up the adultery of the plaintiff, or any other matter which would be a bar to a divorce, separation, or the annulling of a marriage contract; and if an issue is taken thereon it shall be tried at the same time and in the same manner as the other issues of fact in the cause.

The adultery of the plaintiff, a condonation, or other bar may be united in the answer.

This was the rule of the Court of Chancery. (Wood *vs.* Wood, 2 Paige, 108; and Smith *vs.* Smith, 4 *Ibid.*, 432.)

We apprehend that under an answer setting up the adultery of the plaintiff, affirmative relief may be given to the defendant upon the failure of the plaintiff and success of the defendant. (See Anon., 17 Abbott, 48, and cases; McNamara *vs.* McNamara, 9 Abb., 18.)

SECTION IV.

By rule 91, on a complaint filed by a husband for a divorce, if he wishes to question the legitimacy of any children of his wife, the allegation that they are, or that he believes them to be illegitimate, shall be distinctly made in the complaint. If a reference is ordered proofs shall be taken upon the question of legitimacy as well as upon the other matters stated in the complaint; and if the issue is tried by a jury, an issue on the question of the legitimacy of the children shall be awarded and tried at the same time.

All these questions of adultery denied, or in bar, and legitimacy, when raised by the pleadings, will be

brought before the referee by the general order to hear and determine the cause and the issues therein.

The other bars to relief, such as condonation, which may defeat the action, even when the offence is proved, are hereafter noticed.

## SECTION V.

### *Selection of Referee.*

By section 273 of the Code, in all cases of reference, the parties (except when the defendant is an infant or absentee) may agree in writing upon the person or persons, and a reference shall be ordered to him or them, and to no other persons. If the parties do not agree the Court shall appoint.

But further, no person shall be appointed referee to whom all the parties object, *except in actions for divorce.* This implies the power in these actions to appoint a referee against objections.

Under section 266, the assent of the Court, we have seen, to a waiver of a jury trial in an action for divorce, is requisite. It would be prudent to have such consent to the nomination of the referee also.

By rule 87, the Court cannot, in cases of divorce, separation, or annulment, order a reference to a referee nominated by either party where the defendant fails to answer, or there is no denial in the answer.

The Form of the Order (Appendix No. 32) meets these suggestions.

## SECTION VI.

### *Proceedings and Rules upon Reference.*

If the reference is to hear and determine by consent, the case is brought on by the usual notice of

trial. If only to take testimony and report, by a notice or summons.

The first question which should be passed upon is, whether there has been a marriage recognized by our law as valid. There can be no adultery if there was no lawful marriage.

A marriage in this State may be celebrated before certain officers named in the statute, and the entry, or a certificate to a copy, may be received as presumptive evidence of the fact of marriage. (2 R. S., 139, §§ 7, 16.)

By the second section of the act of 1867, chap. 887, the husband or wife, in an action for adultery, may be admitted to prove the marriage, but for nothing else.

In Pugsley *vs.* Pugsley (9 Paige, 589) the Chancellor declared that the proof of the marriage and residence was as essential as proof of adultery. The Master should take proof of everything necessary to give the Court jurisdiction. The proof of residence, when the adultery was committed, or of marriage here, should be taken, and also whether there had been any condonation since discovery.

Cohabitation raises a presumption of marriage, but not if it is proven that the woman's character was bad; nor where the fact of a prior marriage has been made out. (Taylor *vs.* Taylor, 1 Lee's Rep., 259; Cowram *vs.* Lowe, *Ibid*, 638.) Where the woman's reputation is unblemished, it creates a strong presumption. (*Ibid;* and see Montague's case, 2 Ad. Rep., 375.)

The law of Scotland, and we deem our own, is, that a contract *de presenti* by way of declaration or acknowledgment, constitutes marriage without consummation. But it must be deliberate, serious, with the *animus contrahentium*, and not produced by force or fraud. (Dalrymple *vs.* Dalrymple, 2 Hag. Con. Rep., 102.)

In O'Gara *vs.* Eisenlohr (38 N. Y., 296) it was stated to be competent to prove a marriage by cohabitation, acknowledgment by the parties themselves, reception of them as man and wife by their relatives and friends, and by common reputation.

In Rockwell *vs.* Garricliff (62 Barbour's Rep., 408) it was held, that proof of actual marriage was only required in cases of bigamy and for criminal conversation. In other cases it might be proved by cohabitation, reputation, acknowledgment of the parties, reception in the family, or other circumstances inferring it. Other excepted cases are actions for annulment and separation.

In general the law deems a foreign marriage valid if celebrated according to the mode held lawful in the country where it takes place. (Middleton *vs.* Jannerin, 2 Hag. Cons. Rep., 448; Herbert *vs.* Herbert, *Ibid*, 271.) If it is void from being contrary to the laws of the country in which it took place, it will be deemed invalid here. (*Ibid*; and Ulmender *vs.* Ulmender, 2 Clarke & Finelly, 529.)

But a distinction has been taken in the English courts. A marriage between English subjects had abroad, and invalid at the place of celebration, is not necessarily void in England. (Ruding *vs.* Smith, 2 Hag. Cons. Rep., 385; Burn *vs.* Tenner, *Ibid*, 369.)

In Winslow *vs.* Winslow (6 Abbott's Rep., 264) the question as to the legality of the mode of marrying in Ireland was discussed. It was shown that a marriage there need not be in *facie ecclesiæ;* that it may be solemnized by a dissenting minister. That the officiating person was a reputed clerk or minister is enough. His orders need not be proved.

The consent to enter into a marriage is essential. It is the intention to enter into a permanent union with

a view to the rearing of children, and other duties. *Consensus non concubitus facit matrimonium*, the maxim of the Roman law, is in truth the principle of all the law on the subject. (Dalrymple *vs.* Dalrymple, 2 Hag. C. R., 62.)

SECTION VII.

*Proofs of Adultery.*

The difficulty of obtaining in a great number of cases, cases where concealment is sedulously sought, has led the Courts to dispense with decisive proof of the actual fact. Yet circumstantial evidence must be so strong as to lead to a legal conviction that the crime has been committed. This must be such as would lead the guarded discretion of a reasonable and just man to the conclusion. (Williams *vs.* Williams, 1 Hagg. Cons. Rep., 299; Lovenden *vs.* Lovenden, 2 *Ibid*, p. 2.) The parties cannot successfully contrive to keep without the reach of direct and positive proof. (Burgess *vs.* Burgess, 2 Hagg. Cons. Rep., 220.) In this case of Burgess *vs.* Burgess Sir William Scott thus stated the rules as to this circumstantial evidence: "Isolated and detached facts may lead to a conclusion of crime; for the proper way to consider this sort of evidence is not to take them separately, but in conjunction; they mutually interpret each other; their constant repetition gives them a determinate character; and such habits, when continued in public, lead to the inference that the parties would go greater lengths if opportunities of privacy occurred. Such indecorous and improper familiarities, with opportunities of privacy, advance to the footing of proximate acts; and if the privacy is shown to be frequent, the Court will infer the commission of the crime."

General cohabitation has been generally treated as sufficient. It excludes the necessity of proving particular facts. (Cadogan *vs.* Cadogan; Lovenden *vs.* Lovenden, 2 Hagg. Cons. Rep., 4.)

Where the husband was absent, and the wife during such absence gave birth to a child, it was only necessary to prove such birth, identity, and non-access. (Richardson *vs.* Richardson, 1 Hag. Rep., p. 6.)

A woman going to a house of ill-fame with a man, and being there a sufficient time for the act, is conclusive proof of adultery. It is impossible for a woman to go there but for a criminal purpose. (Williams *vs.* Williams, 1 Hag. Cons. R., 303; Lovenden *vs.* Lovenden, 2 *Ibid*, p. 24.)

So in Astley *vs.* Astley (1 Hagg. Rep., 719) adultery would seem to be inferable from a man going to a brothel, and being alone with a woman in a room for a considerable time.

But evidence of two or three visits to a brothel without a woman was not deemed sufficient by itself to grant a decree.

In a case reported (17 Abbott Pr. R., 48, Anonymous) the leading witness testified to facts plainly proving adultery had the testimony come from one of unimpeached character. The cross-examination did not in the least shake his evidence. But he had been employed to watch the conduct of the defendant upon promise of a reward, the amount depending upon his success in proving her guilt. It was judged to be immaterial whether the employment was by the plaintiff's authority, or only upon that of one assuming to act for him.

His evidence, it was held, was not to be wholly disregarded. The judge should give the most severe

examination to everything stated by him. Dr. Lushington in Ciocci *vs.* Ciocci (26 Eng. L. & Equi. Rep., 613) supported this view.

So it was held that the evidence of a prostitute and keeper of a house of ill-fame was not to be wholly rejected, but could not be alone a ground of decision; nor even when she was corroborated in several particulars which, however, did not lead directly to the conclusion of adultery.

There might be such an aggregate of testimony, each portion coming from sources suspicious or entitled to little credit, as to meet what the law demanded—proof of proximate facts leading to the conclusion that innocence could not, by any just reasoning, be reconciled with them.

A *particeps criminis* is a competent witness to prove the fact of adultery. But his confessions are a weak species of testimony. They should be connected with some act of the wife tending to sustain them. (Soilleux *vs.* Soilleux, 1 Hagg. Consist. Rep., 376; Burgess *vs.* Burgess, 2 *Ibid.*, 223.

## SECTION VIII.

### *Confessions.*

Confessions on the part of the defendant or alleged guilty party, while not inadmissible, have been regarded with great distrust. By canon 105 of the canons of 1603 it was provided, that "good circumspection and advice be used, and that the truth may (as far as possible) be sifted out by the deposition of witnesses and other lawful proofs and evictions; and that credit be not given to the sole confession of the parties themselves, however, taken upon oath, either within or without the court."

A confession, proved to the satisfaction of the Court to be perfectly free from all suspicion of a collusive purpose, may be sufficient for a divorce. Even the English cases, influenced much by the canon, seem to warrant this.

In Lyon *vs.* Lyon (62 Barbour's Rep., 168) the Court examined the subject. But it was first concluded that there was not a single act testified to, which showed, or tended to show, that adultery was contemplated, much less committed. The charge rested wholly on the confessions of the defendant, a man. No one could hesitate to pronounce the case totally without evidence of adultery, unless full credit was given to the defendant's confessions.

The Court recognized the rule, that confession, when perfectly free from all taint of collusion, when confirmed by circumstances and conduct, ranks among the highest species of evidence.

In Billings *vs.* Billings (11 Pickering, 461) it is declared, that when the confessions are made under circumstances which entirely preclude suspicion of collusion or imposition, they will be received, and a decree granted, without further evidence.

In a case in New York, confessions volunteered on two separate occasions, to two distinct persons, when the husband was away, and under circumstances which, if not absolutely precluding, were without the slightest suspicion of collusion—where they were as to times, places, and circumstances so much in detail, and so consistent in themselves, as to strongly negative fabrication, were acted upon by an eminent lawyer as referee, and by a judge of the Superior Court, and a divorce granted upon them alone.

In the case of Owen *vs.* Owen (1 Haggard's Rep., 261) it was intimated by the Court, that the rule as to

confessions alone being insufficient, might not apply to such admissions in unsuspected letters to third persons. In the case above mentioned in New York, letters to the husband containing confessions were deemed inadmissible. There was a presumption of collusion or influence.

SECTION IX.

*Bars to Relief.*

There are several cases specified in the statute (2 R. S., 145, § 40) in which the divorce may be refused, although the adultery be established. These are :

*(A)—Connivance.* "Where the offence appears to have been committed by the procurement or with the connivance of the complainant."

It is presumed that the word *procurement* here used is synonymous with collusion as understood in the Ecclesiastical law, viz, an agreement of one party to commit the adultery so as to enable the other to obtain the remedy. (Crewe *vs.* Crewe, 3 Hagg., 130.)

In a suit for separation by reason of the wife's adultery, connivance on the part of the husband may be pleaded, together with a denial of her guilt. (Moorsom *vs.* Moorsom, 3 Hagg. Rep., 87.) Connivance implies a knowledge of the wife's guilt, or some grounds for supposing an adulterous intercourse had been or was about to be formed, and then the inference that the husband consented to, or acquiesced in the wife's adultery. (Rogers *vs.* Rogers, 3 Haggard's Rep., 57.)

The husband must be shown to have intentionally contributed to the wife's guilt, There must be intentional permission, or corrupt facility given by him. (Moorsom *vs.* Moorsom, *ut supra.*)

The husband must make such proof of the fact charged as shall not involve himself, nor create a legal

bar; for if, by the evidence which he brings to establish adultery, he at the same time implicates himself, the wife will have the benefit of this evidence, nor can he avail himself of a case in which he does not appear with clean hands. (Timmings *vs.* Timmings, 3 Hagg. Rep., p. 77.)

It has been held that where the action was for adultery of the wife committed with A, the husband's connivance with adultery committed with B about the same time was a bar. (Lovering *vs.* Lovering, 3 Hagg. Rep., p. 85.)

The doctrine of connivance is not pressed as strictly against the wife as it is against the husband. Forbearance whilst there is a reasonable hope of the husband's return, while the *spes recuperandi* is not wholly lost, will not bar her. (Kirkwall *vs.* Kirkwall, 2 Hagg. Cons. Rep., 278; Turton *vs.* Turton, 3 Hagg. Rep., 338.)

Condonation may be meritorious; connivance necessarily involves criminality, and, therefore, the evidence to sustain it should be more grave and conclusive. (Turton *vs.* Turton, 3 Hagg. Rep., 338.)

*(B)—Condonation.* The next provision of the statute when relief may be denied though adultery be proved, is, "Where the offence charged shall have been forgiven by the injured party, and such forgiveness shall be proven by express proofs, or by the voluntary cohabitation of the parties with knowledge of the fact."

This is the condonation of the ecclesiastical law.

It is a conditional forgiveness, which bars all relief for the adultery committed previously, but is inoperative if the offence is renewed afterwards. The right to relief then revives. It is revived as to the former acts of adultery, which were condoned, as well

as to those subsequently committed. (Ferrers *vs.* Ferrers, 1 Hagg. Cons. Rep., 130; Durant *vs.* Durant, 1 Hagg. Rep., 745; Smith *vs.* Smith, 4 Paige, 432.)

But as to a husband, this rule was in one case greatly modified.

The wife having committed adultery on the first of three successive nights, and the husband, with full knowledge of this, sleeping with her on the second night, was held barred of redress for a further adultery on the third night. (Timmings *vs.* Timmings, 3 Hagg. Rep., 78.) Perhaps this was rather connivance and collusion than condonation proper.

In Hodges *vs.* Hodges (3 Hagg. Rep., 218) the husband proved an adulterous connection with one person five years after he and his wife had separated, of which two children were born. It was held that the husband's knowledge of adulteries committed with persons before their separation would not bar him from sentence.

Condonation is not held so strictly against the wife as against the husband. When it is by implication, the bar is not so rigidly enforced. It is not improper for her to show a patient forbearance for a time, in hopes of the husband's reform. (D'Aguilar *vs.* D'Aguilar, 1 Hagg. Rep., 786; Beeby *vs.* Beeby, *Ibid*, 793.)

Where former adulteries have been condoned by the wife, in order to establish her condonation of subsequent adultery as a bar, evidence must be given of her knowledge of such renewed misconduct. Such knowledge is not to be inferred from slight facts and from cohabitation, but it must be clearly and distinctly proven. (Durant *vs.* Durant, 1 Hagg R., 733.)

The statute declares that the forgiveness is to be proved by express proofs, or by cohabitation with knowledge of the facts.

The express proof of the statute may, as we have considered in a case as a referee, require only parol evidence of forgiveness, if it is positively free from ambiguity and unconditional. Letters written after full knowledge of the fact, and plainly imparting voluntary pardon, are of course admissible.

A case occurred within the writer's knowledge, in which just after the discovery, the wife slept once with the husband, and then persistently refused to cohabit. It was supposed that this did not amount to the cohabitation of the statute, so as to be forgiveness. Something more continued was required, although where the line could be drawn was not plain. (See Durant *vs.* Durant, 1 Hagg. Rep., 768.)

Condonation will not be presumed from the wife's not withdrawing from the house of the husband, if circumstances, such as having habitually separate beds, repel the supposition of cohabitation. (Beeby *vs.* Beeby, 1 Hagg. R., 796; and D'Aguilar *vs.* D'Aguilar, *Ibid*, 782.)

(*C*)—The fact that the suit was not brought within five years after the discovery by the plaintiff of the offence charged, may also come before the referee. This is another case of a legal bar provided in the statute.

Chancellor Walworth in the case of Valleau *vs.* Valleau (6 Paige, 211) held that if the complainant knew that his wife had contracted a second marriage, and continues openly to cohabit with such second husband, or that she is living in open adultery with another person, the right to file a bill for a divorce will be barred after the expiration of five years from the time of his knowledge, although the adulterous intercourse continues down to the commencement of the suit.

It may be useful here to notice a point of pleading which may arise before the referee.

By the former chancery rule (163) the bill must be sworn to, and the complainant must have positively averred that the adultery charged was committed without his consent, concurrence, privity, or procurement; that five years have not elapsed since he discovered the fact that such adultery had been committed; and that he has not voluntarily cohabited with the defendant since the discovery of such adultery. (See Dodge *vs.* Dodge, 7 Paige, 589.)

The 87th rule of the Supreme Court, while it recognizes that these allegations may be in the complaint, does not positively require them. When the cause is brought within that rule, an affidavit must contain them before judgment can be rendered.

If they are set out in the complaint a general denial of all the allegations of the complaint may, under section 149 of the Code, put them in issue and bring them before the referee. But if they are not set forth in the complaint, or some of them are not, it would seem the answer must affirm them, or those omitted, both under section 150 and rule 89.

(*D*)—*Recrimination.* The statute also declares as a bar, "Where it shall be proved that the complainant has been guilty of adultery under such circumstances as would have entitled the defendant, if innocent, to a divorce."

This is the recrimination of the Canon and Civil law. The law withholds from a guilty party a remedy for the guilt of the other. It is a moral and social doctrine and found in the Roman Law. (Foster *vs.* Foster, 1 Hagg. Cons. Rep., 167, 153.)

A recrimination may be sustained on facts not so strong as may be necessary to maintain a suit for adultery. This was ruled in Foster *vs.* Foster (*ut supra*), and it was declared "that a husband who enters the

Court with a criminal imputation upon the conduct of his wife, must clear his own character of all reasonable imputation of the same nature ; and if he complains of her impurities, must be untainted with gross impurities of his own."

But the language of our statute may raise a doubt whether this view could be sustained in our Courts—whether the recriminatory allegation must not be established by precisely the same amount of evidence, as if the party setting it up were suing for a divorce.

The adultery of the husband, whether *before* or *after* the infidelity of the wife, may be set up as a complete bar. (Proctor *vs.* Proctor, 1 Hagg. Cons. Rep., 290; Astley *vs.* Astley, 1 Hagg. Rep., 714.)

A single act of adultery proven will be sufficient to defeat the husband's action against the wife. (Astley *vs.* Astley, *ut supra*, p. 722.)

## SECTION X.

### *Legitimacy.*

Rule 91, before cited, requires the husband suing for a divorce, and questioning the legitimacy of any of the children, to allege the fact in his complaint, and upon a reference, proofs shall be taken upon this as well as the other issues.

The provision of the statute (2 R. S., 145, § 41), is that, if the wife is complainant, the legitimacy of any children of the marriage, born or begotten of her before the filing of the bill, shall not be affected by the decree of dissolution. And if the husband is complainant, the legitimacy of the children born or begotten before the commission of the offense charged, shall not be

affected by the decree. (*Ibid*, § 42.) The legitimacy of other children of the wife may be determined by the Court upon the proofs in the cause. The legitimacy of all children, begotten before the commencement of the suit, shall be presumed until the contrary be shown. (*Ibid.*)

In Cross *vs.* Cross (3 Paige, 140) the Chancellor said that it was the duty of the Court to examine the proofs as to alleged illegitimacy with the most rigid scrutiny, to prevent the rights of innocent children being sacrificed by the misconduct or negligence of their parents. He cites and approves of the decision in the Banbury case (1 Simon & Stuart's Rep., 153.)

He also held that the admissions of the wife, as to the bastardy of a child, could not be received.

## SECTION XI.

### *On Failure to Answer or non-Denial.*

By the 87th rule, when an action is brought for a divorce, if the defendant fail to answer the complaint, or if the facts charged in the complaint be not denied in the answer, the Court to which application is made for judgment shall order a reference, "to take proof of all the material facts charged in the complaint." This is substantially the 41st section of the revised statute. (2 R. S., 144.)

By the 92d rule, no judgment declaring void a marriage contract, or granting a divorce, or for a separation, or limited divorce, shall be made, of course by the default of the defendant, or in consequence of any neglect to appear at the hearing of the cause, or by consent. And every such cause shall be heard after the trial of the issues, or upon the coming in of the

proofs, at a Special Term of the Court; but where no person appears on the part of the defendant, the details of the evidence in adultery cases shall not be read in public, but shall be submitted in open court.

The course of proceedings before the referee will be that usually pursued upon interlocutory references. The proofs are to be signed and annexed to the report, which is to be filed under the 39th rule.

# CHAPTER II.

## ANNULMENT OF MARRIAGE.

§ 1. Notices of the Law in New York.
§ 2. Referred by Consent.
§ 3. Course on Failure to Answer.
§ 4. Want of Proper Age.
§ 5. Idiocy or Lunacy.
§ 6. Former Husband or Wife Living.
§ 7. Force or Fraud.
§ 8. Physical Incapacity.

### SECTION I.

### *Annulment of Marriage.*

The Legislature of New York, in the year 1830, adopted some of the rules of the Ecclesiastical and Civil Law as to the annulment of a marriage. It had been before held that the Court of Chancery could only interfere, when it could set aside any other contract, such as upon the ground of lunacy or fraud in obtaining it. (Burtis *vs.* Burtis, Hopk., 563.)

The causes for an annulment now are: the want of proper age; the existence of a former husband or wife with whom the marriage is in force; idiocy or lunacy at the time of the contract; force or fraud in obtaining a consent; and impotency.

### SECTION II.

### *On Consent.*

When a case of this description is put at issue by the denial of an answer, it may, we conclude, be re-

ferred, by consent, to hear and determine under sections 254 and 270. It is true that by the Revised Statutes (2 R. S., p. 175, § 45) all issues upon the legality of a marriage (except where a marriage is sought to be annulled on the ground of the physical incapacity of one of the parties) shall be tried by a jury of the country, and the Chancellor shall award a feigned issue for the trial thereof.

But the language of section 266 (if the assent of the Court is given) and that of section 270 is amply sufficient, we apprehend, to warrant a waiver of a jury trial and consent to refer.

Referring to the Code alone, a waiver under section 260 of the trial by jury would not seem requisite; a written consent duly signed, and filed with the clerk, and an order would be sufficient. Considering, however, the above cited provision of the Revised Statutes, it would be clearly most prudent to have both waiver and consent.

It is scarcely possible to suppose that a case of this description can be brought within section 271, so as to warrant a compulsory reference to hear and determine.

## SECTION III.

### *Failure to Answer.*

By the 87th rule of the Supreme Court, where an action is brought to obtain a divorce or separation, or to declare a marriage contract void, if the defendant fail to answer the complaint, or if the facts charged in the complaint are not denied in the answer, the court to which application is made for judgment shall order a reference to take proof of all the material facts charged in the complaint. "The Court shall in no

(*such*) case order the reference to a referee nominated by either party." (*Ibid.*)

The 92d rule has been quoted before in full (*ante*, ch. i., § 10) and is applicable to these cases. No judgment can be pronounced on default or neglect to appear at the hearing, or by consent. The cause is to be heard at Special Term after the trial of the issues, or coming in of the proofs.

The order of reference is in general to hear and take the proofs in the action, and report the same, with an opinion thereon, to the Court.

The practice before the referee, his report, and the mode of correcting his decision are the same as upon a reference to take proofs, etc., in a case of adultery. (*Ante*, ch. i., § 10.)

It is first to be noticed that in cases of nullity generally the alleged fact of marriage—the legal nullity of which by a declarative sentence is prayed—must be proved. However clearly the party may prove all the facts upon which a sentence might be founded if the marriage itself were proven, yet if he failed in establishing this, he must fail entirely. (Nohes *vs.* Milward, 2 Add. R., 286.)

SECTION IV.

The first ground for annulling a marriage stated in the statute is, that the parties, or one of them, had not attained the age of legal consent. (2 R. S., 142, § 19.)

The revisers reported, and the legislature in 1829 adopted the suggestion, that the age of legal consent should be seventeen for the male and fourteen for the female. By the act of 1830, chap. 320, § 24, the section was repealed. The rule of the common law, which was the same as that of the civil law, then prevailed. The legal age of consent was fourteen for the male, and

twelve for the female. (Coke Litt., 33 a, 2 Inst. 434; Bennett *vs.* Smith, 21 Barbour's R., 440.)

"A bill to annul a marriage on the ground that one of the parties was under the age of legal consent may be brought by the parent or guardian entitled to the custody of such minor, or by the next friend of such minor; but in no case shall such marriage be annulled on the application of a party who was of legal age at the time it was contracted, nor when it shall appear that the parties, after they had attained the age of consent, had for any time freely cohabited as husband and wife." (2 R. S., 142, § 21.)

By a statute of May 28, 1841 (Laws 1841, chap. 257), the Chancellor or any Vice-Chancellor might, on the application of the wife, by a sentence of nullity declare void any marriage contract, heretofore or hereafter made, upon evidence of the following facts:

1. That the female was at the time of the alleged marriage under the age of fourteen years, and that such marriage was without the consent of her father, mother, guardian, or other person having the legal charge of her person, and was an offense on the part of the husband, under the statute, and punishable according to law.

2. That the marriage was not followed by consummation or cohabitation, nor had been ratified by any mutual assent of the parties after the female had attained the age of fourteen years.

By the 88th rule, if the application is to annul on the ground that the party was under the age of legal consent, an affidavit must be produced showing that the parties have not freely cohabited as husband and wife after the plaintiff became of legal age.

By section 4 of the statute, 2 R. S., 139, when the marriage is annulled for want of legal age or under-

standing, or for physical causes, or for force or fraud, it shall be void only from the time its nullity shall be declared by a court of competent authority. By the Civil and Ecclesiastical laws, the want of the legal age for consent makes the marriage void *ab initio*. Corporal infirmities make it voidable by sentence.

## SECTION V.

### *Idiocy or Lunacy.*

Sentence of nullity may also be declared where one of the parties was an idiot or lunatic at the time of the marriage. The application in a case of idiocy may be made by any relative of such idiot interested to avoid the marriage, at any time during the lifetime of either of the parties. (2 R. S., 142, § 23.)

If the ground is the lunacy of one of the parties, it may be declared void at any time during the continuance of that lunacy, or after the death of the lunatic in that state, during the lifetime of the other party to the marriage, on the application of any relative of the lunatic interested to avoid the marriage. (*Ibid*, § 24.)

If the marriage of an idiot or lunatic is sought to be annulled during the lifetime of both the parties to the marriage, and no suit shall be prosecuted by any relative, a person may be admitted by the Court to prosecute as the next friend of such idiot or lunatic. (*Ibid*, § 25.)

The marriage of a lunatic may also be declared void on his own application after his restoration to reason; but in such case no sentence of nullity shall be pronounced if it shall appear that the parties freely cohabited as husband and wife, after the lunatic was restored to a sound mind. (*Ibid*, § 26.)

By the 88th rule, if the complaint seeks to annul the marriage as the plaintiff was a lunatic, an affidavit must be produced, showing that the lunacy still continues; or the plaintiff must show, by his affidavit, that the parties have not cohabited as husband and wife after the plaintiff was restored to his reason.

The relative who is authorized to bring an action, must have an interest in the property which may be affected. A remainder-man, heir presumptive, or any one whose interest under wills, conveyances, powers of appointment, etc., may be impaired if the marriage is not set aside, can institute the suit. (Poynter's Law of Divorce, p. 101 and notes.)

In Faremouth *vs.* Watson (1 Phillimore, 355) the sister of the husband had an interest under the will of the mother, contingent upon the brothers dying without lawful issue. Her action to declare the nullity was sustained. The Court said that a slight interest was sufficient.

In the Earl of Portsmouth *vs.* the Countess of Portsmouth (1 Hagg. Ecc. Rep., 355) the action was by the committee of the lunatic. The statute of New York (Laws 1843, ch. 112, § 2) does not cover such a case, and it is presumed that the Committee cannot apply without getting himself appointed next friend.

In Turner *vs.* Turner (1 Hag. Cons. Rep., 414) the husband, after his recovery, instituted a suit for nullity on the ground of his insanity at the time of contract.

If a commission of lunacy has returned the party a lunatic, the return does not definitely settle the question of nullity, although the marriage took place within the time covered by the inquisition. The finding is a piece of evidence in support of the allegation of unsoundness of mind at the time of the marriage, but no more. The Court must be satisfied by evidence of its

own. (Portsmouth *vs.* Portsmouth, *ut supra;* De Hart *vs.* Deamer, 496.) It is not necessary that a commission should have issued. (Turner *vs.* Myers, 1 Hag. Con. Rep., 416.)

SECTION VI.

The sentence of annulment may be pronounced on the ground "that the former husband or wife of one of the parties was living; and that the marriage with such former husband or wife was then in force." (2 R. S., 142, § 20, 2.)

When a marriage is sought to be annulled on this ground, it may be declared void on the application of either of the parties during the lifetime of the other, or upon the application of such former husband or wife. (*Ibid*, § 22.)

When it shall appear and be so decreed that such subsequent marriage was contracted in good faith, and with the full belief of the parties that the former husband or wife was dead the issue of such marriage born or begotten before its nullity shall be declared, shall be entitled to succeed in the same manner as legitimate children to the real and personal estate of the parent, who, at the time of the marriage was competent to contract; and the issue so entitled shall be specified in the sentence of nullity. (2 R. S., 142, § 23.)

Every marriage during the lifetime of a former husband or wife is absolutely void from its date, except when the former marriage of the party remarrying has been dissolved or annulled for cause some other than the adultery of such party, and except when the former husband or wife has been finally sentenced to imprisonment for life.

If any person whose husband or wife shall have absented himself or herself for the space of five successive years without being known to such person to be living during that time, shall marry during the lifetime of such absent husband or wife, the marriage shall be void only from the time that its nullity shall be pronounced by a Court of competent authority. (2 R. S., 139, § 5.)

In Bird *vs.* Bird (1 Lee's Rep., 621) the sentence of nullity by reason of a former marriage was pronounced, and alimony to the second wife was refused.

Bayard *vs.* Morphew (2 Phill. Rep., 321) was also a case of annulment by reason of a former marriage.

The defendant in a suit for annulling a marriage on the ground of a former marriage may set up the nullity of the first marriage in bar. (Bruce *vs.* Burke, 2 Adds. Rep., 471.) Our statute sanctions this. The first marriage must be in force.

But if the nullity is on the ground of infancy, or for force or fraud, or physical incapacity, the marriage, under our statute, is only void from sentence. A nullity on either of these grounds, we presume, could not be set up. By the English rule, the marriage in cases of nonage, idiots, and the like is void *ab initio.* For corporal infirmities it is valid for all civil purposes until declared void. (Elliott *vs.* Gurr, 2 Phill. Rep., p. 19.)

In Meadows *vs.* the Duchess of Kingston (Ambler, 756) the bill was by the plaintiff in right of his wife, who was sister and presumptive heir at law of the Duke. It stated a fraudulent and void marriage, because the defendant was the lawful wife of one Harvey at the time. She pleaded a lawful marriage, and that by final sentence in the Consistorial Court it was decided that she was not joined or contracted in mat-

rimony with said Harvey. The Lord Chancellor held the sentence to be conclusive in this action.

The case of Linden *vs.* Linden (36 Barbour's Rep., 62) presents several points of importance. The plaintiff commenced an action for limited divorce on the ground of cruelty. The defendant denied the allegations, and also set up that the plaintiff had a husband by a former marriage living at the time of the marriage between the parties, and that it was then in force. He demanded a divorce on that ground. The case was referred to a referee to hear and determine. He reported that the charge of cruelty was not made out; and that *a former husband of the plaintiff was living at the time of the marriage between the parties to the suit.* He refused a divorce, and directed judgment against the plaintiff without costs. Prior to entry of judgment the defendant moved at Special Term on the report for leave to enter judgment annulling the marriage between himself and the plaintiff, which was denied. On appeal it was held, that the relief could not be granted, on the ground that the referee had not reported the evidence nor the fact that there ever was a valid marriage between the plaintiff and a former husband, or that such marriage was in force at the time of the marriage between the parties.

There may have been a divorce, or a valid marriage formed or contracted while the wife believed the former husband was dead. The report was wholly insufficient as a foundation for the relief demanded.

In Crossley *vs.* McKinney (30 Barbour, 48) the order of reference was to take the testimony in the action and report the same, subject to all legal objections. The report with the proofs annexed was heard at Special Term, and the Judge upon the testimony found that the second marriage was made in the honest

belief that the former husband was not living, five years having elapsed.

It has been held, that if nullity of marriage is pleaded in bar of an action charging adultery, the question of nullity should be first disposed of. A plea of a prior marriage is ground to stay proceedings as to the adultery. That question should be first decided. (Mayhew *vs.* Mayhew, 2 Phill. Rep., 2; Robins *vs.* Wolesly, 1 Lee's Rep., 616.)

No sentence of nullity of marriage shall be pronounced solely on the declarations or confessions of the parties; but the Court shall, in all cases, require other satisfactory evidence of the existence of the facts, on which the allegation of nullity is founded. (2 R. S., 144, § 36.)

SECTION VII.

*Force or Fraud.*

The nullity of a marriage may be declared where the consent of one of the parties was obtained by force or fraud. (2 R. S., 142, § 20, 4.)

The suit may be brought during the lifetime of the parties or one of them, on the application of the party whose consent was so obtained, or of the parent or guardian of such party. or of some relative interested to contest the validity of such marriage. (*Ibid*, 143, § 30.)

But the relief cannot be given if it shall appear that at any time before the commencement of the suit, there was a voluntary cohabitation of the parties as husband and wife. (*Ibid*, § 31.)

If there be any issue of the marriage which is annulled on this ground, the Court shall decree the custody to the innocent party, and may also decree a

provision for their education and maintenance, out of the estate and property of the guilty party. (*Ibid*, § 32.)

By the 88th rule, if the complaint is for annulment on the ground of force or fraud, the plaintiff must show by affidavit that there has been no voluntary cohabitation between the parties as man and wife.

The great case of Portsmouth *vs.* Portsmouth (1 Hagg. Rep., 365) was as much dependent on the fraud of the party and her abettors, as upon the want of understanding of the plaintiff. A marriage *de facto* was solemnized under circumstances of clandestinity inferring fraud and circumvention, between a person of weak and deranged mind and the daughter of his trustee and solicitor, who had great influence over him, and by whom he was treated as of unsound mind. The Court annulled the marriage.

## SECTION VIII.

### *Physical Incapacity.*

The nullity of a marriage may also be adjudged for the cause that one of the parties was physically incapable of entering into the marriage state. (2 R. S., 142, 20–5.)

A suit to annul a marriage on the ground of the physical incapacity of one of the parties shall only be maintained by the injured party against the party whose incapacity is alleged, and shall in all cases be brought within two years from the solemnization of the marriage. (*Ibid*, 143, § 33.)

The trial of an issue in such a case need not be by jury. It is excepted in the statute. (2. R. S., 175, § 45.)

The 87th rule covers this case also. Upon failure to answer, or where the facts are not denied, a reference must be ordered to take proof of the essential facts charged in the complaint.

The action will lie on behalf of the husband on the ground of the malconformation of the wife. (Briggs *vs.* Morgan, 3 Phillimore, 325.) But the Court regards such an action with great disfavor. There should be a decided necessity for examination, the proofs being so much against the modesty of the sex. (Guest *vs.* Shipley, 2 Hagg Con. R., 321.)

The existence of impotency must be clearly made out. When there is a probability of capacity the Court will not interfere. Yet frigidity and incapacity may be united in the same libel. (Welde *vs.* Welde, 2 Lee's Rep., 578.)

The age of the parties must appear. The Court has refused to interpose when they were at an advanced period of life. (2 Hagg. Cons. Rep., 328.)

If the parties occupied the same bed for a long time, and the woman is certified to be *virgo intacta*, the presumption of impotency is almost inevitable. (Pollard *vs.* Weytoun, 1 Hagg. Rep., 727.)

If a party is capable at the marriage, but becomes impotent afterwards, there is no ground for a sentence. (Belcher *vs.* Belcher, Burns. Ecc. Law, 503; Best *vs.* Best, 1 Ad., 435.)

Devanbagh *vs.* Devanbagh (5 Paige, 556) was a case of a bill to have the marriage declared null for the impotency of the wife. The bill was filed about fifteen months after the marriage, and averred efforts at cohabitation for six months. That from plaintiff's own knowledge, and her confessions, she was, and ever had been, physically incapable of sexual intercourse. The bill was taken as confessed, for want of an ap-

pearance. An order of reference was applied for to ascertain the truth of the matters, and for direction as to the mode in which the impotence was to be ascertained.

The Chancellor noticed the provision of the statute excepting such a case from going before a jury. He said: "The Court was by necessary implication armed with all the powers which in England are deemed necessary to ascertain the fact of incapacity.

"It was essential to establish that the incapacity existed when the marriage was contracted, and had continued, and was incurable." He cites various authorities, and adds:

"Impotence on the part of the female, which could not be cured by proper medical treatment or surgical operation, was of rare occurrence. From the nature of the case, it was impossible to ascertain the fact of incurable impotence, especially of the wife, except by a proper surgical examination, in connection with other testimony.

"There was no doubt as to the power of the Court to compel the party to submit to such an examination. But a woman will not be compelled to this, when she has before submitted to such examination by a competent surgeon, whose testimony can be readily procured.

"The defendant could be examined, under oath, to the matters alleged."

The order was for a reference to a Master to take proof of the facts and circumstances stated in the bill. He was particularly to inquire whether the defendant, at the time of the solemnization of the marriage, was physically incapable of entering into the marriage state, and whether she was still *virgo intacta*, and incapable of consummating the marriage contract from incurable impotence.

The Master was to examine the defendant, on oath, as to the matters of the bill, and the defendant was to submit herself to such surgical examination, and by matrons, as the Master might think proper; no person to be present, except the surgeons and matrons selected by the Master, unless with her consent; due regard to be paid to the wishes of the defendant.

The Master was to return the proofs taken before him; no one to be present except the parties, counsel, and witnesses.

The cause came on again upon the Master's report. (6 Paige, 176.) The Court held that there was good reason to believe that the disability could be removed by a slight surgical operation, without the least danger to the defendant; and if there is a probability of capacity, the Court cannot annul the marriage. (2 Lee's Ecc. Rep., 586.)

The woman had been examined, and there was no room to doubt that she was *virgo intacta.*

The fact that the woman was unwilling to cohabit, and therefore refused to submit to a slight surgical operation for the purpose of removing the disability, is not a ground for a decree of nullity.

In the case of I., falsely called H. *vs.* H. (4 Swabey & Tristram's Rep., 515) the suit was by the wife for nullity of marriage by reason of the husband's impotency. He denied the charge, and alleged consummation. She obtained a medical inspection, certifying that she was *virgo intacta,* and that there was no impediment to consummation.

The Lord Ordinary said: "Two questions arose in such cases. *First,* Whether in fact consummation had taken place. *Next,* If not, whether this arose from the impotency of the party charged. The media of proof are threefold. Medical inspection of the parties; med-

ical testimony as to the conclusion to be drawn from such inspection; and, finally, the examination of both parties upon oath as witnesses."

The law of England now permits each party to depose on his own behalf. The judge discusses the advantages and disadvantages of this change, and concludes that the Court can now determine in a broader and fuller light.

The husband did not appear in the action, and would not submit to an order for inspection.

A sentence was pronounced upon the minute detailed evidence of the wife.

In M., falsely called C. *vs.* C. (Law Journal of 1872, Vol. 41, p. 37) the parties had each been examined under oath, and positively contradicted each other. A medical examination failed to prove that the woman was a virgin. She had delayed for nine years to bring an action. Her suit was dismissed, and having a separate estate, she was charged with costs.

# CHAPTER III.

## SEPARATION.

§ 1. In what Cases.
§ 2. Suit by Husband.
§ 3. Wife sues in her own Name.
§ 4. Reference by Consent.
§ 5. Defenses.
§ 6. Inhabitancy.
§ 7. Cruelty, What constitutes.
§ 8. Unsafe to Cohabit.
§ 9. Abandonment and Refusal to Support.
§ 10. Report.

### SECTION I.

*In what Cases. Statutory Provisions.*

A separation from bed and board forever, or for a limited time, may be decreed by the Court of Chancery, on the complaint of a married woman, in the following cases:

1. Between any husband and wife, inhabitants of this State.

2. Where the marriage shall have been solemnized, or shall have taken place, within this State, and the wife shall be an actual resident at the time of exhibiting her complaint.

3. Where the marriage shall have taken place out of this State and the parties have become and remained inhabitants of this State at least one year, and the wife shall be an actual resident at the time of exhibiting her complaint.

Such separation may be decreed for the following causes:

1. The cruel and inhuman treatment by the husband of his wife.

2. Such conduct on the part of the husband towards his wife as may make it unsafe and improper for her to cohabit with him.

3. The abandonment of the wife by the husband, and his refusal or neglect to provide for her. (2 R. S., 146, 147, §§ 48, 49.)

The bill of the complainant in every such case shall specify particularly the nature and circumstances of the complaint on which she rests, and shall set forth times and places with reasonable certainty.

The defendant in any such suit may be permitted to prove in his justification the ill conduct of the complainant, and on establishing such defense to the satisfaction of the Court, the bill shall be dismissed. (*Ibid.*, §§ 50, 51.)

SECTION II.

*Suit by Husband.*

By an act passed in 1824 (Ch. 205, § 12) it was declared lawful for the Court to extend the same rights to husbands as are given to *femes covert* by the 10th and 11th sections of the act concerning divorces, and to grant to the husband the same relief for the like causes as *femes covert* are entitled to. The act referred to was 2 R. L., 1813, p. 200. In Perry *vs.* Perry (2 Paige, 506) it was held that this act of 1824 remained in force after the revised statutes.

The Ecclesiastical law gave the remedy to the husband against the wife. (Clark's Praxis, p. 144; Harris *vs.* Harris, 2 Phill., 111; Whitmore *vs.* Whitmore, 1 Lee's Rep., p. 30; Smith *vs.* Smith, 2 Phill., 207.)

## SECTION III.

### *By Wife in Her own Name.*

It was held before the Code that the wife could not file the bill in her own name, but must have a next friend. (Wood *vs.* Wood, 2 Paige, 454, 8 Wendell, 357.) He had to give security in the sum of two hundred and fifty dollars. (3 Paige, 387.) But by the 114th section of the Code, when the action is between her and her husband, she may sue alone. And in no case need she prosecute or defend by a guardian or next friend.

## SECTION IV.

### *Reference by Consent.*

The reference to hear and determine may be had by consent under section 270. The waiver of a trial by jury does not appear to be necessary.

By the 89th rule, on a reference to take proof of the facts charged in a complaint for separation or limited divorce, the examination of the plaintiff on oath may be taken as to any cruel or inhuman treatment alleged in the complaint, which took place when no witnesses were present competent to testify to the facts.

This provision was contained in the 166th rule of the Court of Chancery.

## SECTION V.

### *Defenses.*

By the 90th rule, the defendant may set up in his answer any matter which would be a bar to a separation; and if an issue is taken thereon, it shall be tried at the same time and in the same manner as other issues of fact in the case.

The 51st section of the Act enables the defendant to prove in his justification the ill conduct of the complainant, and on establishing such defense to the satisfaction of the Court, the bill shall be dismissed.

It may be difficult to define what acts of ill conduct of the wife will bar her claim for a separation when the ground is cruelty, etc. There may, however, be cases of such gross ill treatment and neglect as amount to it, as well as wilful and continual violation of her domestic duties.

Another defense is condonation. This is defined as forgiveness with an implied condition that the injury will not be repeated, and that the other party shall be treated with conjugal kindness. (Durant *vs.* Durant, 1 Hagg. Rep., 761; Ferrers *vs.* Ferrers, 1 Hagg. Cons. Rep., p. 130.)

It is merely retrospective. If the offense forgiven is afterwards renewed, the party has a right to revert to the former facts, if they are brought in conjunction with the latter. (*Ibid*, and Westmeath *vs.* Westmeath, 2 Hagg. Rep., p. 1, supplement.)

Adultery cannot be set up as a bar to an action for separation on the ground of cruelty. (Henry *vs.* Henry, 17 Abbott, 431, and cases.)

Nor can cruelty be interposed where the action is for adultery. (Griffin *vs.* Griffin, 23 Howard, 183; Diddell *vs.* Diddell, 3 Abbott, 167. See also Chambers *vs.* Chambers, Consist. Rep., 452.)

The doctrine of condonation is less rigidly enforced against the wife than against the husband. (D'Aguilar *vs.* D'Aguilar, 1 Haggard, 786.)

It may be by express forgiveness, or implied, as from cohabitation with knowledge of the offense. But this latter is not held so strict a bar against the wife,

for it is not improper that she should for a time show a patient forbearance. (Beeby *vs.* Beeby, 1 Haggard, 793.)

SECTION VI.

*Inhabitancy.*

The first clause of section 48 of the Statute requires the husband and wife to be inhabitants of the State. But by section 55, "if a married woman, at the time of exhibiting a bill against her husband (for this separation as well as a divorce for adultery), shall reside in this State, she shall be deemed an inhabitant thereof, although her husband may reside elsewhere."

This provision avoids a difficulty arising from the legal rule that the residence of the wife follows that of the husband. (Domat 2, 436; 5 Vesey, 787; 1 Johns. Rep., 432.) The husband therefore cannot, by removing out of the State, defeat the action of the wife.

For the provision of the Statute, as to the husband and wife being inhabitants of the State, see *ante*, this chapter, § 1.

As to the clause of the marriage being solemnized within the State, and the wife being a resident, see the case of Palmer *vs.* Palmer, 1 Paige, 276.

SECTION VII.

*Cruelty.*

What constitutes the cruel and inhuman treatment which warrants a sentence of separation, has been discussed in many cases; but nowhere more admirably than by Lord Stowell in Evans *vs.* Evans (1 Consist. Rep., 38). "This must be understood that it is the duty of Courts to keep the rule extremely strict. The causes must be grave and weighty, and such as show an im-

possibility that the duties of the married life can be discharged. In a case of personal danger no duties can be discharged.

"What merely wounds the mental feelings is in few cases to be admitted where not accompanied with bodily injury, either actual or menaced. Mere austerity of temper, rudeness of language, even occasional sallies of passion, if they do not threaten bodily harm, do not amount to legal cruelty.

"I take it that the rule cited from Clarke and the other books of practice, is a good general outline of the canon law, and law of this country, upon the subject. In the older cases of this sort which I have had an opportunity of looking into, I have observed that the danger of life, limb, or health is usually inserted as the ground upon which the Court has proceeded to a separation. This doctrine has been repeatedly applied in the cases that have beeu cited. The Court has never been driven off this ground. It has been always jealous of departing from it, and I have heard no one case cited in which the Court has granted a divorce without proof given of a *reasonable apprehension* of bodily injury. I say an *apprehension*, because assuredly the Court is not to wait till the hurt is actually done; but the apprehension must be reasonable; it must not be one arising from an exquisite and diseased sensibility of mind.

"Words of abuse are not, but words of menace indicating a malignant intention of doing bodily harm and affecting the security of life or health are, legal cruelty. Words of mere insult, however galling, will not justify the interference of the Court."

These propositions are sustained by the cases of D'Aguilar *vs.* D'Aguilar, 1 Hagg., 775; Oliver *vs.* Oliver, 1 Consist. Rep., 304; Kirkman *vs.* Kirkman,

*Ibid*, 409; and Monks *vs.* Monks, 7 Robert Rep., 153, Superior Court.

In the case of Sarah Bikin *vs.* J. Bikin (17 Abbott Rep., 19), some points of moment were decided. The parties had married in New York, and were inhabitants at that time and at the date of the action in 1861. The case was tried before a referee in 1862.

Various acts of ill-usage in Belgium and Pennsylvania were proven under objections.

The Statute of Limitation was no answer, as to some of these acts, not having been pleaded.

The plaintiff was examined as a witness to acts committed when no other person was present. The defendant was excluded. But perhaps he would be admissible now. (See *ante*, Title I., ch. iv., § 8.)

The report was in favor of the plaintiff, and judgment was entered without application to the Court, in the usual manner.

The referee had also passed upon the question of property claimed by the wife as bought with her own money.

## SECTION VIII.

### *Unsafe Cohabitation.*

The statute, we notice, has two clauses—the first for cruel and inhuman treatment; the second, such conduct as renders it unsafe and improper for her to cohabit with him. The former statute was in like manner in the disjunctive.

The Vice-Chancellor in Mason *vs.* Mason (1 Edw. Rep., 78) treated the two clauses as synonymous. Chancellor Kent, in his commentaries, suggests that the latter clause may mean the same thing as the reasonable apprehension of danger of the English ecclesiastical law. (2 Comm., 126.) But, this last is classed

under the *Sevitia* of the civil and canon laws, and the law of the English courts. Thus, among other authorities, Sir John Nicoll, in Westmeath *vs.* Westmeath (2 Hagg. Cons. Rep., 1), says: "There must be ill treatment and personal injury, or the reasonable apprehension of personal injury. What must be the extent of the injury, or what will reasonably excite the apprehensions, will depend upon the circumstances of each case."

Words of menace, if accompanied with the probability of personal violence, will be sufficient. (1 Haggard's Rep., 509.)

There may then be cruelty without actual personal violence; but it is clear that there must be the indication of such a temper and such menaces as lead decidedly to the result that violence will be used. (See further Holme *vs.* Holme, 2 Add. Rep., 27; Otway *vs.* Otway, 2 Phill. Rep., 95.)

There have been cases in which the communication of a venereal disease, or the half-compelled cohabitation after recent child-birth, have been before the Court, and within the English rule this would be *Sevitia* the endangering or injuring health. (See Durant *vs.* Durant, 1 Hagg. Rep., 707; D'Aguilar *vs.* D'Aguilar, *Ibid*, 773.)

It may be that our legislature considered cruel and inhuman treatment to be blows and personal violence; and in the second clause intended to provide for those other cases which, though involving cruelty, are not such in its common acceptation.

SECTION IX.

*Abandonment and Refusal of Support.*

Separation may also be adjudged "for the abandonment of the wife by the husband, and his refusal or neglect to provide for her."

By the English law mere desertion, even if it is what is termed malicious, does not justify a divorce. (Evans *vs.* Evans, 1 Hagg. Cons. Rep., 120.)

In the case of Stone *vs.* Stone (Sept. and Oct., 1842) the construction of the statute was brought before the assistant Vice-Chancellor with the aid of such counsel as the present Judge Woodruff and Mr. George Wood on one side, and Mr. Henry W. Warner on the other. The following are the heads of the decision given:

"The arrangement of the subdivisions of the 49th section (2 R. S., 81) is a sufficiently plain indication of the sense of the Legislature that the word "and" in the third subdivision is to be treated as copulative, so that there are but three causes for a separation, and not four, as contended for by counsel. There must be both an abandonment and a refusal or neglect to support the wife. For example, if an abandonment is plainly made out, an avowed desertion, and yet an adequate support is provided by the husband, the case is not within the statute. If there is no abandonment, yet a great neglect of giving adequate support, the wife must also fail, unless the neglect comes up to cruelty. (Ahrenfeldt *vs.* Ahrenfeldt, 1 Hoffman's Chan. Rep., 46 and cases.)

"What will amount to an abandonment within the statute may not be always easy of decision. But at least there must be acts, or declarations explained by acts, showing an intention permanently to withdraw from the wife's society. In some cases the laws of

other countries have adopted an arbitrary rule, making a continued absence for a definite period the evidence of such intention. But certainly actual absence from the place of abode is not required. The desertion may be as absolute and as designed, when the parties remain in the same village, or even under the same roof, as if there was a removal to a distant place."

So in regard to the question of the support of a wife, it was observed by the Assistant Vice-Chancellor in Paff *vs.* Paff, March, 1847, that upon the evidence in the case, it was doubtful whether there was more restriction than a severe economy demanded. It would be an intolerable inquisition into the arrangements of private life, if this Court should attempt to mete out what was proper for family needs or comforts. There might be cases where a base sordidness drives a wife to such servile and uncalled for labors, and such wretchedness of clothing and food, wholly disproportionate to the husband's means, as would satisfy the statute in this particular.

In the case of D. *vs.* D., 1873, the point of abandonment was established. A reasonable and adequate support had been for some time allowed, but without cause greatly diminished, so as to be inadequate to the support of the wife as became her station, and as the husband could well allow. This provision of the statute was held by a referee to be complied with. A decree ensued.

SECTION X.

*Report, etc.*

When the order is to hear and determine, the practice will be such as is stated under Title I., Chap. iv., *Ante.* And if it is to take the proofs and report, the practice upon an interlocutory reference will be the guide. (*Ante,* Title II., Chapter I.)

# CHAPTER IV.

## ALIMONY AND EXPENSES OF SUIT.

§ 1. Statutory Provision as to Expenses, Definition of.
§ 2. As to Proof of Marriage.
§ 3. Cases in which it is Allowed.
§ 4. Amount.
§ 5. From Commencement of Suit.
§ 6. Not Superseded by Marriage.

### SECTION I.

### *Statutory Provisions—Definition of.*

In every suit brought, either for a divorce or a separation, the Court may, in its discretion, require the husband to pay any sums necessary to enable the wife to carry on the suit during its pendency. (2 R. S., 148, § 56.) And whatever may be the authority, it has been long the settled course and practice to allow the wife a sum for her support during suit. In Mix *vs.* Mix (1 John. Ch. R., 103) it was so allowed, and also in Denton *vs.* Denton. (*Ibid*, 364.) Perhaps it was founded upon the statute of 1815, p. 225, §§ 1, 5 and 11, and the Revised Statutes, §§ 54 and 58.

But in Brinkley *vs.* Brinkley (50 N. Y. Rep., 184) it was observed that the statute did not give the power to allow alimony *pendente lite.* The right was based upon the equitable jurisdiction. The transfer of the power in divorce cases to the Court of Chancery conferred the usual attendant powers exercised in the Ecclesiastical Courts.

The course in the Court of Chancery was by petition and a reference to a Master. The same course is pursued under section 271, clause 3, but to a referee. The order may include both support and an allowance for expenses.

The definition of alimony is "that proportion of the husband's estate, which by the sentence of the Court is allowed the wife for a maintenance upon a separation from him, *pendente lite.*" (Floyer's Proctor's Pr., 50; Smith *vs.* Smith, 2 Add. 254.)

SECTION II.

*Proof of Marriage.*

It has been stated in some cases that alimony is not to be allowed, unless the fact of marriage is either admitted or proven. (Smith *vs.* Smith, *ut supra;* see Bird *vs.* Bird, 1 Lee's Rep., 209.) Perhaps the rule is that it will not be allowed where, upon the affidavits, the conclusion is clear that there is no marriage.

In Brinkley *vs.* Brinkley (50 N. Y. 184) the point was examined; and although there was a sworn denial of the marriage, yet against it a fair presumption of its having taken place was raised, and held sufficient. (And see Leslie *vs.* Leslie, 6 Abb. N. S., 193.)

The referee upon a reference as to alimony cannot enter upon the question of marriage. (Herferth *vs.* Herferth, 2 Abbot N. S., 483.)

SECTION III.

*Cases for Allowance.*

Alimony is granted where the husband is the complainant for nullity of marriage, or for adultery; and her expenses of suit also. (Portsmouth case, 3 Add., 63; Reese *vs.* Reese, 3 Phill. Rep., 390.)

In Monk *vs.* Monk (7 Robertson's Rep., 153) the charges against the husband were only on information and belief, and were positively denied. Alimony was refused. (See Osgood *vs.* Osgood, 2 Paige, 621; and Clark *vs.* Clark, 7 Robt., 284.)

In Solomon *vs.* Solomon (28 Howard, 218) the Court held that a meritorious cause of action must be shown by the wife. The allowance was not a matter of course.

SECTION IV.

The amount to be allowed must of course vary according to the circumstances, and no inflexible rule can be laid down. The most general rule which has prevailed of late years is to give one-third of the husband's net income. In Mix *vs.* Mix (1 John. C. R., 102), where the income was $170 a month and there were no children, $30 was allowed. In Denton *vs.* Denton (*Ibid*, 104) the husband was worth $200,000, and $100 a month was ordered.

In Lawrence *vs.* Lawrence (3 Paige, 270) the Chancellor discussed the subject at length. The nature as well as extent of the husband's means was to be considered—whether derived from property, or his personal daily labors ; the position of the parties in society ; whether there were children to be supported or relatives dependent upon the husband. Alimony during suit is always in a smaller proportion than that which is assigned as a permanent provision, if she is found entitled to a divorce or separation.

In Germond *vs.* Germond (4 Paige, 643) the expense of support, at the place where the relations of the wife resided, was treated as a proper rule.

Until decree, the allowance is limited to the actual reasonable wants of the wife. In Cook *vs.* Cook (Phill. Rep., 41) the Court say that the wife during suit is to live in seclusion, and requires but subsistence.

In Hawkes *vs.* Hawkes (1 Hagg. Rep., 526) it was said that alimony *pendente lite* is usually about one-

fifth of the annual income, but the proportion might vary.

Upon a decree in favor of the wife, a moiety of the income has sometimes been allowed as a permanent provision, as where a large part of the husband's property came from the wife, and his offense was fully proven, as well as her exemption from fault. (Cook *vs.* Cook, 2 Phill. Rep., 41; Taylor *vs.* Taylor, cited, *Ibid;* Smith *vs.* Smith, 2 Phill., 40, 235.) In Pomfret *vs.* Pomfret (Arches, 1790), and Kempe *vs.* Kempe (1 Hagg. Rep., 532), one-third was allowed. This seems to be the more general rate.

The husband is liable for alimony in all cases of nullity of marriage as well as in cases of adultery. (Bird *vs.* Bird, Lee's Rep., 209.) But it said that there is no instance of this allowance where the proceeding is for sentence of nullity on the ground of a former marriage. (*Ibid.*)

If the wife have an adequate separate income, the alimony may be refused; but yet the costs of the suit should be borne by the husband. (Smith *vs.* Smith, 2 Phill. 152; Wilson *vs.* Wilson, 2 Cons. Rep., 203.)

An allotment of alimony *pendente lite* will be reduced, on proof that the husband is no longer in a condition to aliment the wife, at the rate before assigned. (Cox *vs.* Cox, Add. 276; De Blaquiere *vs.* De Blaquiere, 3 Hagg. Rep., 322.)

§ 5. Alimony is usually allowed from the commencement of the action. (2 Phill. 238.)

§ 6. The allowance of alimony in a decree will not be affected by the subsequent marriage of the wife. (Shepherd *vs.* Shepherd, 8 N. Y. Sup. Ct. Rep., 240; Davis *vs.* Davis, 3 N. Y. Sup. Ct. Rep., 456, recognizing Atwater *vs.* Atwater, 53 Barb., 621.)

# CHAPTER V.

## RELATING TO INFANTS.

§ 1. Appointment of a General Guardian.
§ 2. Sale of their Real Estate.
§ 3. Trustee or Mortgagee
§ 4. Enforcement of Contract of Ancestor.
§ 5. Maintenance.

### SECTION I.

### *Appointment of a General Guardian.*

The 64th rule of Court provides, that for the purpose of having a General Guardian appointed, the infant, if of the age of fourteen years or upward, or some relative or friend if the infant is under fourteen, may present a petition to the Court stating the age and residence of the infant, and the name and residence of the person proposed or nominated as guardian, and the relationship if any which such person bears to the infant, and the nature, situation, and value of the infant's estate.

And by the 65th rule, upon presenting such petition, the Court shall, by inspection or otherwise, ascertain the age of the infant, etc. Then follow directions taken from the former 141st rule of the Court of Chancery.

We submit that the power exists of directing these inquiries to be made by a referee.

The authority of the Chancellor in the appointment of guardians was part of the general jurisdiction over minors and their estates. It continues until the majority of the infant, and is not superseded by his arriving at the age of fourteen. (Kent's Comm., vol. iv., p. 226.)

The Revised Statutes declared (2 R. S., 173, § 39), what was law before, "that the powers and jurisdiction of the Court of Chancery were co-extensive with those of the Court of Chancery in England, except as varied by the constitution and laws of the State. The Supreme Court has succeeded to these powers. By the 16th section of the Judiciary act (Laws of 1847, ch. 280, § 16) all the powers of the Court of Chancery and former Supreme Court were vested in the Supreme Court; and all the powers of the Chancellor, Vice-Chancellor, and Circuit Judges vested in the justices thereof.

The 44th rule of the Court of Chancery in force in 1824 regulated the exercise of this power, as did the 151st and 152d rule subsequently. The petitioner could go before a Master without a previous order, and obtain a report as to all the particulars now embraced within the 64th rule.

But assuming the power to exist of referring, it seems quite clear that an order for it should be obtained at Special Term.

By the English practice, and by the former 152d rule the Master was to give notice, in his discretion, to such of the relatives of the infant as he thought proper, to be heard in relation to the application. He might require the attendance of witnesses before him to give testimony upon the matters. The next of kin—those who would be entitled to a distributive share of his estate, if the infant were dead intestate—should be summoned to appear, and the heir-at-law, if real estate is in question.

The petition, which will be brought before the referee, is the substitute for the state of facts of the former Chancery practice. (Masters in Chancery, 132.) It contains the statements of what is to be inquired into.

Affidavits of the proposed guardian and his sureties should be produced, and a personal examination may be had if deemed advisable. No doubt, if such examination were refused, the referee would be justified in selecting the guardian or sureties. (*Ibid*, 132.)

The infant should be examined personally as to his nomination.

The evidence taken is particularly as to the character and sufficiency of the proposed guardian, and the amount of the property. Lord Bathurst directed that the Masters in all reports of guardians and maintenance of infants should make mention of the age of such infants, the nature and amount of the fortune, and the evidence or grounds on which any particular person is approved of as guardian. (Cited Masters in Chancery, 133.)

The amount of the security to be given, and the requisites of the bond are expressly provided for in rule 66, and will guide the referee. The power of the Court to vary it is also declared, and the last clause in the order, Appendix No. 38, meets this case.

The general rule is, that the father should be appointed the guardian, but circumstances may render this improper. Lord Eldon said in *ex parte* Mountfort (15 Vesey, 445) that there was no doubt the Court would under circumstances appoint, not a guardian (*which could not be in the father's lifetime*), but a person to act as guardian. There the father was in possession of the estate, had misapplied the rents and profits, and was insolvent. (See also De Mandeville *vs.* De Mandeville, 10 Vesey, 63.)

The statute recognizes the right of guardianship in socage to be, first in the father, next in the mother, and if there be neither, then in the nearest and eldest relative of full age, not being under any legal incapacity.

Males are to be preferred in the latter class. (1 R. S., 718.) But the rights of all such guardians are superseded wherever a testamentary or other guardian shall have been appointed under the 8th chapter of the third title of the act. Under these provisions Chancellor Kent observes, guardians by socage or nature have been essentially superseded in practice by guardians appointed by the Court of Chancery, or by the surrogates of the several counties. (Comm., vol. 2., p. 226.)

We presume that the 39th rule applies. The report is filed, and upon the expiration of eight days, application is made for the appointment.

See Appendix No. 39.

Although the Court is not bound to appoint a relative as the guardian of an infant, yet such have a preference. The usual order for an infant under fourteen is, when the father is dead—1, the mother, if unmarried; 2, the paternal; 3, the maternal grandfather; 4, one or more uncles on the father's side; 5, one or more uncles on the mother's side; 6, to any other person. (Kent's Comm., 2, 226.)

The interest of the child is the governing consideration, to which everything is subservient. (The People *vs.* Wilcox, 22 Barb., 178.)

## SECTION II.

### *Sale of their Real Estate.*

The sale of the real estate of infants for their support and education was made part of our statutory law as early as 1814. (37 Sess., ch. 108.) In 1815 it was sanctioned whenever the interest of the infant required it. (Sess. 38, ch. 106.) The present provisions are found 2 R. S., 194, § 176, etc.

The jurisdiction of the Court of Chancery (of course

of the Supreme Court now) to order the sale of the real estate of infants is derived wholly from the Statute, and it has no power to direct such sale unless the infant is seised of the property. (Baker *vs.* Lorillard, 4 N. Y. R., 257.) The power of the Supreme Court to order a sale of infants' real property is wholly a creation of the statute and not inherent in it as a Court. Hence the statute must be strictly followed and its terms fully complied with. (O'Reilly *vs.* King, 2 Robt., Rep., 587.)

The petition should be presented to the Court at Special Term, and the order there made, and not at Chambers. This was the decision of Justice Balcom in the matter of Bookout, 1856 (21 Barbour, 348), after a careful examination. The practice in Chancery was to make such orders in Term time, or on regular motion days. The Supreme Court is to make the order. A Court, not a judge, is to do it. He cannot, at Chambers, be deemed to hold a *court* for such business.

Whether the case of The People *vs.* Wilcox (22 Barb., 178), which went to the Court of Appeals (14 N. Y. Rep., 575), has not weakened this decision, need not be examined. The prudent course is, doubtless, to apply at Special Term.

The mode of proceeding is regulated by the 67th and 68th rules of the Supreme Court. By the former, "an infant, by his general guardian, if he has any, and if there be none, by his next friend, may present a petition, stating the name and residence of the infant, the situation and value of his real and personal estate, the situation, value, and annual income of the real estate proposed to be sold, and the particular reasons which render a sale of the premises necessary or proper, and praying that a guardian may be appointed to sell the same.

"The petition shall also state the name and residence of the person proposed as such guardian, the relationship, if any, which he bears to the infant, and the security proposed to be given, and the petition shall be accompanied by affidavits of disinterested persons, or other proofs, verifying the material facts and circumstances alleged in the petition. And if the infant is of the age of fourteen, he shall join in the application.

"By the 68th rule, if it satisfactorily appears that there is reasonable ground for the application, an order may be entered appointing a guardian for the purposes of the application, on his executing and filing with the clerk the requisite security, approved of as to its form and manner of execution by a justice of this Court, or a County Judge, signified by his approbation indorsed thereon; and directing a reference to ascertain the truth of the facts stated in the petition, and whether a sale of the premises, or any and what part thereof would be beneficial to the infant, and the particular reasons therefor; and to ascertain the value of the property proposed to be sold, and of each separate lot or parcel thereof, and the terms and conditions upon which it should be sold; and whether the infant is in absolute need of any, and what part of, the proceeds of the sale for his support and maintenance, over and above the income thereof, and of his other property, together with what he might earn by his own exertions.

"And if there is any person entitled to dower in the premises who is willing to join in the sale, also to ascertain the value of her dower-right in the premises, on the principle of life annuities.

"But no proceeding shall be had upon such reference until the guardian produces a certificate of the clerk that the requisite security has been proved or acknowledged, and filed agreeably to the order of the

Court; and which certificate shall contain the name of the officer by whom it was approved, and shall be annexed to the report.

"The said report shall contain in itself a statement of the particular reasons which, in the opinion of the referee, render a sale of the premises necessary or proper, and of all the facts required to be ascertained and reported; and shall not refer to the petition or affidavit for such statements."

Rule 69 prescribes the security to be given.

A husband cannot be appointed as guardian to sell the real estate of his infant wife; but some other person may be appointed to unite with him in the sale. (In the matter of Lansing, 3 Paige, 265.)

The language of the statute as to the cases in which a sale may be ordered is very broad. (2 R. S., 194, § 181.)

"Whenever it shall appear satisfactorily that a disposition of any part of the real estate of an infant, or of his interest in any term of years is necessary and proper, either for the support and maintenance of such infant or for his education; or that the interest of such infant requires or will be substantially promoted by such disposition, on account of any part of his said property being exposed to waste or dilapidation, or on account of its being wholly unproductive, or for any other peculiar reasons or circumstances, the Court may order the letting for a term of years, the sale or other disposition of such real estate or interest to be made by such guardian or guardians so appointed, in such manner and with such restrictions as shall be deemed expedient."

"No real estate or term of years can, however, be disposed of in any manner against the provisions of any last will, or of any conveyance by which such estate or term was devised or granted to such infant."

The petition must be addressed to the Supreme Court of the State of New York, and presented at Special Term. (Matter of Bookout, 21 Barb., 348.)

There need not be an appointment of a next friend. The mother, or uncle, or other male relative may apply. (Matter of Whittock, 10 Abbott, 316.) In O'Reilly *vs.* King (2 Robertson's Rep., 587) the uncle, being the nearest male relative, applied as a next friend. The petition of the infants A. B. and C. D. by their next friend was held sufficient. The usual form is, "The Petition of M. H., next friend of," etc.

Under the term "sale or disposition" of the real estate, a mortgage has often been sanctioned by the Court.

In several cases before Vice-Chancellor McCoun, he held that a sale could be made where the infant was a remainder man merely. (*In re* Loomis, January, 1839; *In re* Moore, Feb., 1839.) The parties entitled to the life estate had contracted to sell.

The point depends upon the 116th section. "Any infant seised of any real estate or entitled to any term for years in any lands, may, by his next friend, or by his guardian, apply to the Court of Chancery for the sale or disposition of his property in the manner hereafter directed." (See the authorities, Hoffman's Ch. Pr., Vol. II., p. 210.)

In Baker *vs.* Lorillard (4 N. Y. R., 257) it was held that under the provisions of a will, a grandson and devisee took an estate for life, with remainder in fee to his children or grandchildren, with limitations over, on certain events, in favor of the testator's son. The first-born child took a vested remainder in fee, to open and let in subsequent born children. Five children were born. On application of the father to the Court of Chancery, an order was made

authorizing him to sell and convey so as to bind the interest of the children born, or to be born, as well as the contingent interest of the testator's son.

The title was held defective, because in the event of the grandson (tenant for life) surviving all his children, the limitation to the son would take effect, and because there was in the will a power of appointment, under which the estate could be given to grandchildren.

The Court, however, recognizes the rule that a sale may be made of an absolute vested remainder.

The Court, in the matter of McIlvaine (15 Abbott, 91) held that it could proceed summarily without a reference, if the facts showed a clear case for the sale under the provisions of the statute.

The particulars which are to be embodied in the order of reference, and which the referee is to examine into, are minutely detailed in the 68th rule.

The petition must not be relied upon as evidence. Witnesses must be examined as to the facts. (In the matter of Morrell, 4 Paige, 44.)

The fact that the property of the infant is liable to the expense of a proceeding in partition by adult owners, is always taken in consideration in deciding the propriety of a sale. It is a good reason for selling an infant's undivided share, that the estate is held in common with adults, and that its value is small when compared with the expense of a partition suit, to which it will be subjected if a sale is refused. (In the matter of Congdon Infants, 2 Paige, 566.)

For an Order and a Report in such a case, see Appendix, Nos. 40, 41.

It is filed and the course taken under the 39th rule, as before stated in similar proceedings.

It was the former practice, and no doubt may now

be pursued, for the order to direct the conveyance to be approved by the Master (referee). But whether this is done or not, the form seems definitely settled by the analogous case of the matter of Windle (3 Edwards, 585). It should be A. B., an infant, by C. D., his guardian, of the first part. (Hyatt *vs.* Seely, 1 Kernan, 52.) The signing should be the same. The langnage of the statute (p. 195, § 183) is that if the report of the guardian be confirmed, a conveyance shall be executed under the directions of the Court.

The guardian may unite with other tenants in common in making the conveyance. (O'Reilly *vs.* King, 2 Robertson, 587.)

SECTION III.

*Trustee or Mortgagee.*

By the Statute (2 R. S., 194, § 173), "whenever any infant shall be seised or possessed of any lands, tenements, or hereditaments by way of mortgage, or in trust only for others, the Court of Chancery, on the petition of the guardian of such infant, or of any person in any way interested, may compel such infant to convey and assure such land, tenements, and hereditaments to any other person in such manner as the said Court shall direct."

This is a re-enactment of the act of 1813, chap. 30, and that was taken from the Statute, 7 Anne, cap. 19.

Upon the petition being presented, the Court referred it to a Master to examine into the matters of fact contained in the petition and report the same, with his opinion whether the infant is a trustee within the act, and that he give notice of the time and place of such inquiry to the guardian or next friend of the infant. (*Ex parte* Quackenboss, 3 John. Ch. Rep., 402.)

The petition sets forth the deeds, instruments, or

facts relating to the case; and is laid before the referee. The deeds or instruments should be produced before him, and testimony given as to the age of the infant, death of the party which caused the trust to devolve, or other facts essential. (2 Fowler's Exch. Pr., 432; Masters in Chancery, 142.)

In the matter of Windle (2 Edwards' Ch. Rep., 587) the father of certain infants had purchased the premises and had the conveyance made to his wife, he being an alien. Upon her death, the legal estate vested in her children, and upon petition, they were declared trustees, and the father being naturalized, they were ordered to convey to him.

The proceedings, orders, and report are stated at length in the volume referred to. The evidence satisfied the Master and the Vice-Chancellor.

The deed was signed G. R. W. by J. W., his guardian *ad litem*, which form was approved of by the Court.

There were cases in the English Court as to the point whether an infant child of a trustee, when duties were to be performed, was within the statute. The result appeared to be that if such duties were to be performed by the infants, he was out of the act, and a suit was necessary; but if there were new trustees appointed or to be appointed, he was within it. (2 Coxe's Cases, 231; *ex parte* Jutin, 3 Ves. & Bea., 147.)

By the 174th section of the statute, every conveyance or assurance made pursuant to such order shall be as good and effectual in the law as if made by such infant when of lawful age.

The order upon the report is that the infant convey the premises; and that if the parties do not agree upon the conveyance, the Master shall settle the form. No doubt a reference may be made to the same effect un-

der our system. (Masters in Chancery, p. 145.) In the Court of Chancery in our State, it was settled in several cases that the infant might convey by guardian. (Matter of T. L. Delancey; matter of Eliza A. Ellison, and others.) In Gratz *vs.* Reese, 1817, where the infant was over fourteen, the order was that he by himself, or his guardian *ad litem*, do execute a conveyance and release, etc. The deed was by the infant of the first part, the guardian of the second part, and the grantee of the third part. (Masters, etc., 146.)

SECTION IV.

*Contract of Ancestor.*

By the 175th section of the statute (2 R. S., 194) "the Court of Chancery shall have power to decree and compel a specific performance by an infant heir or other person, of any bargain, contract, or agreement made by any party who may die before the performance thereof, on petition of the executors or administrators of the estate of the deceased, or of any person or persons interested in the bargain, contract, or agreement, and on hearing all parties concerned, and being satisfied that the specific performance of such bargain, contract, or agreement ought to be decreed or compelled."

This is peculiarly "a statutory remedy not heretofore attained by action," under section 471 of the Code. Hence it is a special proceeding under sections 1, 3, and 11. It was declared to be such in the Court of Appeals. (In the matter of Hyatt, 11 N. Y. Rep., 1 Kernan, 52.)

The first provision upon the subject in our law was in the Statute of 1814. (Laws of 1814, R. 129, § 3.) An English statute was passed in 1830. (1 Wm. 4, ch. 50, § 16.)

The provisions, we suppose, arose from the doubt whether the infant heir of a party who had contracted to sell real estate was within the statute as to infant trustees. (See Goodwin *vs.* Lyster, 3 Wm., 337, and other cases; Masters in Chancery, p. 143.)

The proceeding is to be by petition. In the precedent of a case which occurred in the Court of Chancery in 1833 (Hoffman's Chancery Prac., vol. iii., No. 310), the petition set forth a contract made by J. M. with the petitioner for a sale of certain premises described, a true copy of which was annexed, with an allegation that it was duly signed by both parties. It stated the payment of the deposit agreed upon in such contract; that before the time fixed for the completion, to wit, on or about the day of the said J. M. departed this life leaving such contract unperformed. That he died intestate, leaving A. M., his only child and heir-at-law, upon whom the legal estate had descended, subject to the rights of the petitioner. That he had been ever ready, and was now ready to complete such purchase. It prayed that the said A. M., the infant heir, might be decreed to convey such lot of ground and premises to the petitioner upon his paying or securing to be paid, as the Court should direct, the balance remaining due upon the contract.

The order directed a reference to examine and report as to the truth of the facts set forth in the petition and especially whether the alleged contract had been duly and legally entered into by the said J. M. in his lifetime; if any part of the purchase money had been paid, and whether it was proper that a specific performance of such agreement should be decreed, with liberty to state any special circumstances. It contained also the following clause: "And J. J. R., one of the solicitors of this Court, is hereby appointed guardian

*ad litem* of such infant, to appear for him on such reference, and the future proceedings herein, to whom notice of all proceedings shall be given."

The proceedings before the referee will be the same as those upon the application for a sale of his real estate. (*Ante*, § 2.)

For the Form of an Order, see Appendix No. 42, and of a Report, *Ibid*, No. 43.

The 39th rule we suppose to apply, and the report becomes absolute in eight days. After which, if there is no exception, the Court may be applied to at Special Term for an order to convey.

In the case above referred to from Hoffman's Practice, the money was directed to be brought into Court, subject to its further order.

In Hill *vs.* Resequin (17 Barb. Sup. Ct. Rep., 160) there was an action by the vendee, against adult heirs, the widow, and infant heirs for the performance of the ancestor's contract. The widow could not be compelled to convey, but the value of her interest could be deducted.

The heir could be compelled to fulfill the contract of his ancestor, though not named in it.

The infant was directed to convey without covenants, and adults who were united in the suit, to convey with covenants against their own acts.

## SECTION V.

### *Maintenance.*

It is the course of the English Court to appropriate a certain sum out of the property of an infant for his support, and to direct a reference to settle the amount.

In *ex parte* Whitfield (2 Atk., 315), Lord Hardwick said: There might be great convenience in applica-

tions of this kind, because it might be a check upon infants with regard to their behavior, and an inducement with persons of worth to accept of the guardianship, when they have the sanction of this Court for what they do on account of maintenance. In *ex parte* Kent and *ex parte* Salter (3 Br. C. Rep., 8 and 500) such orders were made on petition without suit. In *ex parte* Bostwick (4 John. Ch. Rep., 102) Chancellor Kent approved of this practice.

The petition made generally by the guardian sets forth the infancy and appointment, the estate and annual income, and prays for a suitable sum to be allowed for support and education. The order is for a reference to consider and report what sum is proper to be allowed out of the estate of the infant for his maintenance and education. Sometimes the order is, "what shall be allowed *for the time past, and to come.*" In such a case, the guardian in fact passes his accounts as to prior expenditures, producing his vouchers and proof in the usual manner. In the course of a suit for administering assets, where an infant is a legatee, or entitled to a distributive share, if the fact is clear that there will be a sufficient fund, such an order may be made without waiting for the completion of the taking the account. In Rogers *vs.* Wilkes (6 John. Ch. Rep., 586) such an order was made.

When a suit is pending, the proceeding before the referee should be upon notice to all parties who have appeared.

### *Father Living.*

If the father of an infant is living, and desires an appropriation out of the fortune of the infant for his support, it is made part of the order, that the Master (Referee) shall inquire and state whether the father is

in circumstances and of ability to maintain and educate the infant suitably to his fortune; and if not, then to consider what should be a proper allowance. (Masters in Chan., p. 138.)

"When the question turns upon the ability of the father to maintain the child, the rule is not laid down upon his insolvency only, but maintenance is given, when the father is not in such circumstances as to be able to give the child an education suitable to the fortune he possesses. (Lord Thurlow, 1 Coxe's Cases, 80; and see Cooper's Rep., p. 52.)

If property is given to trustees to apply the income to the maintenance of an infant, it is construed to mean that such application shall be made, if there is no maintenance due to him by law; while the father is living such maintenance is due from him. (Andrews *vs.* Partington, 2 Coxe's Cases, 223.)

Where the father is found entitled to have an allowance, it may be extended to repayment of sums theretofore spent. (14 Vesey, 499.) In Wilkes *vs.* Rogers (6 John. Rep., 594) it was decided in the Court of Errors that the allowance for maintenance might be made for the time past.

Although the mother, like the father, is under the obligation to support a child, yet in her case especially an allowance will be made out of a fund given as a provision for it. (Fawkner *vs.* Watts, 1 Atkyns, 406; Wilkes *vs.* Rogers, *ut supra.*)

In making the allowance, the circumstances of the family may be taken into consideration. (1 Vesey, 160; 7 Vesey, jr., 403.)

# CHAPTER VI.

## IDIOTS, LUNATICS, ETC.

§ 1. Jurisdiction—Inquisition.
§ 2. Appointment of Committee.
(A) Reference.
(B) Persons to be Appointed.
(C) Security.
(D) Maintenance.
(E) Report.
§ 3. Sale of Real Estate.
§ 4. Sale to Pay Debts.
§ 5. Lunatic Trustee, etc.
§ 6. Contract of.
§ 7. Contract of Ancestor.

### SECTION I.

### *Jurisdiction and Inquisition.*

"The Chancellor shall have the care and custody of all idiots, lunatics, and persons of unsound mind, and persons who shall be incapable of conducting their own affairs in consequence of habitual drunkenness, and of their real and personal estates, so that the same shall not be wasted or destroyed, and shall provide for their safe keeping and maintenance, and for the maintenance of their families and the education of their children, out of their personal estates and the rents and profits of their real estates respectively." (1 R. S. 814, § 1.)

By section 30 of the Code the County Court has, among other cases of jurisdiction, the care and custody of the person and estate of a lunatic, or person of unsound mind, or an habitual drunkard, residing within the county. The 86th rule of Court provides as to the

costs of the commission, and we believe there is nothing else in Code or rules upon the subject.

The mode of proceeding to ascertain the lunacy, etc., by a *writ de lunatico inquirendo* is stated in the Books of Practice. (Hoffman's Ch. Pr., vol. 2, 248; Barbour's Ch. Pr.)

SECTION II.

*Appointment of Committee.*

*(A)—Reference to Appoint.* Upon the report of the inquisition finding the party a lunatic, etc., a petition is presented for the appointment of a committee. The petition is usually by some near relative of the lunatic. It may be by any one who may become interested in his property, or by some one as a next friend. It states the issuing of the writ *de lunatico* and its return, and prays that the petitioner may be appointed the committee, or for a reference to inquire and certify who is a fit and proper person to be appointed committee or committees of the person and estate.

The Court will sometimes, where the property is small, and the evidence as to qualifications upon affidavits are satisfactory, appoint a committee without a reference. (See several cases in our Court, Moulton's Practice, vol. iii., p. 511, *n*; *Ex parte* Farrow, 1; Russell *vs.* Mylne, 112.)

For an Order of Reference, see Appendix No. 44.

It is observed by Mr. Shelford (On Lunacy, p. 84) that the inquiry as to the property of the party has been omitted upon the inquisition for a long period; that this properly and conveniently belongs to the Master upon the reference directed to be made, after the return.

*(B)—Persons to be Appointed.* The selection of the persons to be appointed as the committee, either of

person or estate, or both, is within the unlimited discretion of the Court, and, of course of the referee in the first instance. But some general rules influence, though they do not control, that discretion.

Occasionally different persons are appointed committee of the person and of the estate. As to the person any one may be appointed who appears suitable. The old rule which excluded the heir-at-law from this office is overturned. (Domay's case, 2 P. Wms. 263 ; 7 Vesey, 591.) In the matter of M. Livingston (1 John. C. R., 436) the daughter of the lunatic and her husband were appointed for both person and estate. The next of kin may be appointed. In general when a person connected with the family is found eligible, and able to give the security, he should be preferred. (Matter of Hussey, 1 Molloy, 226.)

The custody of a female unmarried will be given to one of her own sex. (*Ex parte* Ludlow, 2 P. Wms., 635.) The custody of a lunatic wife will be given to the husband, and of a husband to the wife, generally with some other person associated with her, especially a medical man. (Lord Wenman's case, 1 P. Wms., 701 ; *ex parte* Huep, 18 Vesey, 22.)

If the lunatic has a son of proper age and no objection exists as to him, it is almost of course to appoint him committee of the estate. (Matter of Lord Bangor, 2 Molloy, 518.)

The appointment of a stranger as the committee, without the assent of the relatives and next of kin of the lunatic, and without a reference or notice to the parties prospectively interested, is unauthorized.

If the next of kin unite in a petition or give their consent in writing, it will suffice. Otherwise there should be a reference, and then they will have notice, and may propose themselves. Lord Eldon's remarks

in *ex parte* Le Huep (18 Vesey, 221) against strangers being appointed who might intrude into domestic troubles are cited and approved. (In the matter of Jerusha Laromee, 19 Howard, 375.)

*(C)—Security.* The security by the English practice, and that in our Court of Chancery, was a recognizance by the committee with two responsible persons as sureties in double the whole amount of the property other than real, and in double the annual rents of the real estate. This was to be estimated according to the value of the lunatic's life by the Tables. The 66th rule of the Supreme Court as to security by a general guardian of infants, is very similar, and may we think be taken as a safe guide, and in all its particulars.

*(D)—Maintenance.* The referee under the order is to settle the amount to be allowed for maintenance. In passing accounts this sum is to be allowed without vouchers, but it is open for the relatives, or others interested, to object when not duly applied.

If a different person is committee of the person the amount is in general to be paid to him. (Masters, etc., 155.)

It is the principle of the Court to allow a liberal sum for expenses and care. It must be measured by the extent of his fortune, and what is needed for his comfort and health. All the income may be applied, if required, and the next of kin and expectants are not to be regarded. (*Ex parte* Chumley, 1 Vesey, p. 296; *ex parte* Baker, 6 *Ibid*, 8.)

The Chancellor may direct the children of the lunatic to be supported out of the estate. (Foster *vs.* Marchant, 1 Vernon, 263; Cases in Shelford on Lunacy, p. 154.) In the case of Sutton before the Vice-Chancellor of the First Circuit, where the father of the luna-

tic was old and infirm, and had been supported by him, the committee continued to advance money for his support and clothing, which were allowed on passing the accounts. (Matter of Sutton, 1836 ; see 2 Merivale, 101; and cases in Shelford, 155–162.)

Chancellor Walworth went at length into this subject in the matter of Heeny. (2 Barbour's Ch. Rep., 326.) He held that the Court might apply surplus income for the support of persons not next of kin, if satisfied that the lunatic would have done so, if of sound mind. And so for the education of children adopted by him before his lunacy.

The family establishment should be kept up with the same number of domestics as before, and generally a sum expended therefor, not exceeding that spent by him for such purposes. So the committee may place in his hands small sums of money for charitable purposes so long as he can judge of the claims of applicants. And also to pay for the support of institutions of religion in the church in which he has been accustomed to worship, not exceeding the amount he had usually so applied. But the committee cannot expend money for objects of general charity or piety, to which the lunatic had not been in the habit of contributing specifically and regularly.

The wife of a lunatic as committee of his person applied for an allowance for the support of her daughter by a former marriage, upon an alleged ante-nuptial agreement that he would do so. This was held not binding, even supposing it duly proven, being by parol.

But it was held that the Court could make an allowance for the support of a step-daughter, if the income of the estate was more than sufficient for the support of the lunatic and the members of his family who had a legal claim upon him for support, and the Court being

satisfied that the lunatic would have allowed it had he continued legally competent. Where the income is ample for the support of himself and family, a sum may be allowed for the support of a relative in need.

It is of course to allow it for the maintenance of children or others who will inherit his estate on his death, and where there is little hope of a recovery. But it seems that in the case of adult children they will be required to stipulate that the amount advanced shall be brought into hotchpot, if any part of the estate fall to them under the Statute of Distribution. (Matter of Willoughby, 11 Paige, 257.)

(*E*)—*Report*. The referee, having prepared his report, should give notice of it to the parties who have appeared, that they may make objections if so advised. (See *ante*, Title 2, Chap. I., *G*., p. 98.)

And we also assume that the report is filed and governed by the 39th Rule. (*Ibid.*)

For the Form of a Report see Appendix No. 45.

## SECTION III.

### *Sale of their Real Estate—Statutory Provisions.*

The provisions of the Revised Statutes as to selling or leasing the real estate of lunatics, etc., are found in 2 R. S., 55, § 11, etc.

Then followed an act of the 30th of April, 1864, chap. 417, "An act to provide for the sale and conveyance of any interest in real estate belonging to lunatics." An act of March 2, 1870, ch. 37, extended the provisions of this act to the cases of idiots and persons of unsound minds.

A Statute was passed May 12th, 1874, chap. 446, "To revise and consolidate the Statutes of the State relating to the care and control of the insane." The

38th section of title 1, is, "When the personal property, and the rents, profits, and income of the real estate of any idiot, lunatic, or person of unsound mind shall be insufficient for his maintenance or that of his family, or for the education of his children, it shall be the duty of the committee of his estate to apply by petition to the Supreme Court, or to the Court having jurisdiction, for authority to mortgage or sell the whole or so much of the real estate as shall be necessary for that purpose, upon which the same reference and proceedings shall be had, and a like order shall be entered, as directed in section nine of title second of this act. And the Court shall direct the manner in which the proceeds of such sale shall be secured, and the income or produce thereof appropriated."

By the 6th section of Title II., any idiot, lunatic, or person of unsound mind seised of any real estate, or entitled to any term of years in lands, may, by committee duly appointed, apply to the Supreme Court for the sale or disposition of the same in the manner hereinafter directed."

The seventh section directs a bond to be given in addition to that given as committee, with such sureties and in such form as the Court shall direct, and provides the conditions thereof.

By section 8, "Upon the filing of such bond, the Court may proceed in a summary manner, by reference to a referee, to inquire into the merits of such application."

The ninth section is as follows: "Whenever it shall appear satisfactorily that a disposition of any part of the real estate of such idiot, lunatic, or person of unsound mind, or of any interest in any term of years is necessary and proper, either for the support and maintenance of such idiot, lunatic, or person of unsound

mind, or for his or her education, or that the interest of such idiot, lunatic, or person of unsound mind requires, or will be substantially promoted by such disposition, on account of any part of such property being exposed to waste and dilapidation, or on account of its being wholly unproductive, or where the same has been contracted to be sold, and a conveyance therefor cannot be made by reason of such lunacy or unsoundness of mind, or for any other peculiar reason or circumstances, the Court may order a letting for a term of years, or the sale or other disposition of such real estate or interest to be made by such committee or guardian in such manner and with such restrictions as shall be deemed expedient, or may order the fulfilment of such contract by conveyance by such committee or guardian according to the terms of the contract.

By the 10th section, no such sale or disposition can be made against the provisions of any last will, or of any conveyance by which such estate, term, or interest was demised or granted to such lunatic, idiot, or person of unsound mind.

The 38th section above quoted makes the power to sell the real estate dependent upon the insufficiency of the personal property (*not its income*), and the rents and profits of real estate for the purposes specified. And they are the maintenance of the lunatic, or of his family, or the education of his children.

So under the former statute, a sale could only be ordered where the personal estate was inadequate, and not merely that the income was insufficient, but the capital must be exhausted before a sale could be directed. (In the matter of Pettit, 2 Paige, 598.) It might be done also where the Court could see that in the natural course of events the personal property would be exhausted. (*Ibid.*)

But the ninth section of title 2 enlarges the specification of cases for a sale or disposition. (1.) Where necessary and proper for the support and maintenance of the lunatic, etc., or for his or her education. (2.) Where it is exposed to waste or dilapidation, or is wholly unproductive. (3.) Cases of an unexecuted contract.

It is presumed that the enumeration in this ninth section does not supersede the provisions of the 38th section; but that the sale may be directed when the maintenance of the *family* of the lunatic, or *the education of his children* make it expedient. The old statute embraced these particulars.

The 27th section of the act of 1874 provides that the real estate of any idiot, lunatic, person of unsound mind, or person incapable of conducting his own affairs in consequence of habitual drunkenness, shall not be leased for more than five years, or mortgaged, aliened, or disposed of otherwise than as hereinbefore directed.

An inquisition taken abroad will not warrant an application for the sale of real estate lying within this State. (Matter of Perkins, 2 John. Ch. Rep., 174.)

## SECTION IV.

### *Sale to pay Debts.*

The 17th section of the act of 1874, ch. 466, provides "that whenever the personal estate of any such idiot, lunatic, or person of unsound mind, shall not be sufficient for the discharge of his debts it shall be the duty of the committee of his estate to apply by petition to the Court by which they were appointed for authority to mortgage, lease, or sell so much of the real estate of

such idiot, lunatic, or person of unsound mind as shall be necessary for the payment of such debts.

"The said petition shall set forth the particulars and amount of the real and personal estate of such idiot, lunatic, or person of unsound mind, the application which may have been made of any personal estate, and an account of the debts and demands existing against such estate."

And by section 18, on presenting such petition, it shall be referred to a referee, or to the clerk of the Court, to inquire into and report upon the matters therein contained, whose duty it shall be to examine into the truth of the representations made, to hear all parties interested in such real estate, and to report thereon.

These provisions are nearly in the words of the former statute upon the same point. (2 R. S., 54, § 12.)

The Court may require additional security to be given by the committee for the faithful application of the proceeds of the mortgage or sale. A clause to this effect might be inserted in the order of reference to decide the propriety of a sale, viz., to inquire what further security ought to be given.

There was an English statute passed (43 Geo. III., chap. 75) authorizing a sale for payment of debts. Lord Eldon held, under this statute, that the Court had authority to sell or not, as it judged should be most for the benefit of the lunatic. (*Ex parte* Phillips, 19 Vesey, 124.)

We should judge that under our statute, if the personalty is insufficient, the Court must grant the order.

In the matter of Pettit (2 Paige, 597) it was declared that the Chancellor had no power to order the sale of the real estate of a lunatic unless it is necessary for the payment of his debts or the maintenance of the luna-

tic or his family, or for the education of his children. But in neither of these cases could it be done if there was personal estate sufficient for the purposes.

In the case of the Executors of Brasher *vs.* Van Cortlandt (2 John. Ch. R., 242) Chancellor Kent considered that the Court of Chancery could decree a sale on a bill by a creditor, or perhaps he could petition under the statute. But the language of the act seems to restrict the course to a petition by the committee. An order might, we judge, be applied for by the creditor, compelling him to apply or be removed.

In the matter of Hopper (5 Paige, 489) it was ruled that the course of a creditor, after a committee appointed, was to apply to the Chancellor by petition for payment of his debt, or for leave to bring a suit, or to establish his claim by a reference to a Master, if the debt is disputed by the committee.

In Soverhill *vs.* Dickson (5 Howard, 109), after a party was found a lunatic, and a committee had been appointed, an action was brought by a creditor against the committee and the lunatic without leave of the Court. The practice of the Court of Chancery was referred to by the judge. That upon the application of a creditor, a reference was ordered, or a suit at law or in equity permitted. (Citing matter of Hopper, 5 Paige, 489.) The new organization of Courts and new mode of proceeding had not essentially changed these regulations. The action might, indeed, proceed if no application was made to restrain it; but a judgment would be of no avail to obtain payment out of the estate.

The course of the creditor was by petition for relief. If the claim was clear and undisputed, payment might be ordered. If disputed, a reference would be ordered,

or the party allowed to bring an action. An order to restrain his proceeding in the action was granted.

In Williams *vs.* Estate of Cameron (26 Barbour, 172), the rule was declared, at General Term, that a creditor must apply to the Court for the enforcement of his claim after a committee is appointed. He will not be allowed to sue at law without the sanction of the Court, and a preference will be given to a reference to settle the claim.

The referee was to report to the Court, with his opinion, and to report the testimony, if requested by either party.

By a provision of the statute prior to 1874, all the debts were to be paid out of the moneys raised by sale or mortgage, in equal proportions, without preference of those founded on sealed instruments.

In the act of 1874 (Part 2, § 21), it is "without giving any preference to such as have a legal priority." In the proposed revision under the act of 1870, the 2198th section restores the language, "upon sealed instruments."

### SECTION V.

### *Trustee, etc.*

Whenever any idiot or lunatic, or person of unsound mind, shall be seised or possessed of any real estate by way of mortgage, or as a trustee for others in any manner, his committee may apply to the Supreme Court for authority to convey and assure such real estate to any other person or persons entitled to such conveyance or assurance, in such manner as the said Court shall direct; upon which a reference and such proceedings shall be had as in the case of an application to sell real estate as aforesaid; and the Court upon

hearing all the parties interested, may order such conveyance or assurance to be made. (Section 23 of Act of 1874.)

So on the application of any person entitled to such conveyance or assurance, by action or petition, the committee may be compelled by the Supreme Court, on a hearing of all parties interested, to execute such conveyance or assurance. (§ 24.)

In all the statutory provisions, the language has been by way of mortgage, "or as a trustee, etc. In the English act as to infant trustees, etc., similar language is employed;" but after forfeiture the legal estate is in the mortgagee, and falls to the heir. A reconveyance is essential, when the mortgagor comes to redeem. But with us, payment of the mortgage money and satisfaction executed is sufficient. Hence if there is a personal representative of the deceased, it would be needless to take any measure as to the lunatic (or infant) heir. If the lunatic is clearly entitled to the mortgage money, perhaps the committee might be empowered to receive it and execute a satisfaction piece. But if not, and generally in such cases, the surrogate should be applied to, to supersede the lunatic if he had obtained letters, or to appoint an administrator, under the provisions as to letters testamentary.

These provisions are almost identical with those in the Revised Statutes. (2 R. S., 55, § 19, etc.)

The cases relating to an infant trustee will be a guide upon the inquiry as to lunatic trustee. (*Ante*, Chap. v., § 3.)

### SECTION VI.

### *Enforcement of Contract.*

The Supreme Court shall have power to decree and compel the specific performance of any bargain, con-

tract, or agreement which may have been made by any idiot, lunatic, or person of unsound mind, while such person as aforesaid was of sound mind and understanding, and to direct the committee of such person to do and execute all necessary conveyances and acts for that purpose. (§ 26 of act of 1874.)

### SECTION VII.

*Contract of Ancestor.*

And by the ninth section of the act of 1874 above cited, the case of the enforcement of the contract of the ancestor appears to be provided for, where the estate, the subject of such contract, has descended to the lunatic.

In one case within the writer's knowledge, the party with whom the contract was made, produced it and proved the execution. The committee attended, as well as the party to whom the property would descend, should the lunatic die.

We refer to the section as to the enforcement of such a contract as against infants, for further observations on the subject.

# CHAPTER VII.

## MORTGAGES.

§ 1. Foreclosure and Sale.
(1.) Power to Decree a Sale.
(2.) Computation of Amount Due where some Defendants contest.
(3.) Decree of Sale.
(*a*) Notice; (*b*) Place of; (*c*) When in Parcels; (*d*) Terms of Sale; (*e*) Adjournments; (*f*) Deposit; (*g*) Opening Bidings; (*h*) Resale; (*i*) Substitution; (*j*) Payment of Incumbrances; (*k*) Reference as to Title; (*l*) Enforcement of Purchase; (*m*) Deeds; (*n*) Report; (*o*) Possession.
§ 2. As to Surplus Money.
§ 3. Redemption of Mortgages.
§ 4. Strict Foreclosure.

### SECTION I.

### *Foreclosure and Sale—Power to Decree a Sale.*

(1)—For a long period the course of foreclosing mortgages, and selling the property to satisfy the debt, has been allowed by the law of New York. It was recognized in an Act of April, 1801. (Webster & Skinner, 643.) But the power was exercised under the Colonial Government. See also the Statute of 1813. (1 R. L. 490, § 11, and 493, § 21.)

The present Act (2 R. S. 191, § 157) authorizes a sale of mortgaged premises, or such part thereof as may be sufficient to discharge the debt and costs, whenever a bill shall be filed for the foreclosure or satisfaction of a mortgage.

The pleadings are of course governed by the Code. The 167th section contains this provision upon the subject of mortgages. "That in actions to foreclose mort-

gages, the Court shall have power to direct the payment by the mortgagor, of any residue of the mortgage debt that may remain unsatisfied after a sale of the mortgaged premises, in cases in which the mortgagor shall be personally liable for the debt secured by such mortgage, and if the mortgage debt be secured by the covenant or obligation of any person other than the mortgagor, the plaintiff may make such person a party to the action, and the Court may adjudge payment of the residue of such debt remaining unsatisfied after a sale of the mortgaged premises against such other person, and may enforce such judgment as in other cases."

These provisions are similar to, but we presume supersede, sections 158 and 160 of the Revised Statute.

By the same section, actions for the foreclosure of mortgages are excepted from the rule which requires that all the causes of action united in one suit, must affect all the parties to the suit, and not require different places of trial.

The 116th section as amended in 1865 prescribes the manner in which a guardian *ad litem* is appointed where an infant defendant resides out of the State, or is temporarily absent.

The 135th section prescribes the mode of proceeding where parties having an interest or lien upon the premises are unknown, and the residence cannot with reasonable diligence be ascertained.

For the other statutory provisions in these cases, see 2 R. S. 192, § 159-172, and Hoffman's Chancery Practice 2, 133, etc.

Those pertinent to the subject of this work are noticed in their proper places.

*(A)—Computation of Sum Due.* By the 72d rule of the Supreme Court, "if, in an action to foreclose a mortgage, the defendant fails to answer within the time al-

lowed for that purpose, or the right of the plaintiff as stated in the complaint is admitted by the answer, the plaintiff may have an order referring it to the Clerk or some other suitable person as referee, to compute the amount due to the plaintiff, and to such of the defendants as are prior incumbrancers of the mortaged premises; and to examine and report whether the mortgaged premises can be sold in parcels, if the whole amount secured by the mortgage has not become due."

"If the defendant is an infant, and has put in a general answer by his guardian, or if any of the defendants are absentees, the order of reference shall also direct the person to whom it is referred to take proofs of the facts and circumstances stated in the complaint, and to examine the plaintiff or his agent on oath as to any payments which have been made, and to compute the amount due on the mortgage, preparatory to the application for judgment of foreclosure and sale."

These provisions are similar to those in the 134th rule of the old Court of Chancery.

When interest or an instalment only of the principal is due, the order may contain a clause that the referee ascertain and report the situation of the mortgaged premises, and whether the same can be sold in parcels, without injury to the interests of the parties. (Everitt *vs.* Hoffman, 1 Paige's Rep., 648.)

(2)—In the case of some defendants contesting the plaintiff's rights, and others admitting them, or being in default, the order it has been ruled, should not embrace the trial of the issue, with a direction for computation.

Thus, in Cram *vs.* Bradford (4 Abbott, 193), in a foreclosure suit, one defendant appeared, but did not answer; the others joined issue as to the mortgage. Upon the notice of trial as to these, and application

under rule 71 as to the other, a reference to hear and decide the controversy was made.

The referee reported in favor of the plaintiff on the issue, and the amount due, etc.; judgment was entered for foreclosure and sale, and against the non-answering defendant for a deficiency, if any.

On a motion to set aside the order and report it was held, that it was regular as to the defendant making an issue, and irregular as to the other.

That it might be cured by a reference to compute the amount, after judgment for sale ; the judgment to be modified in conformity with the report when that came in.

We may deduce from the old case of Baxter *vs.* Corning (6 Paige's Rep.) that although where the defence of some parties extends to the whole demand, the order should not direct a computation of the amount due, yet it may do so where the litigation involves only a part of the property covered.

In Hill *vs.* McRaynolds, (30 Barb., 488) the referee in a mortgage case determined all the issues made by the answer of the defendants who had appeared, against them, and no further trial as to them could be had. The plaintiff was not able to file the report of the referee and enter up judgment, because there were other defendants upon the record who had not submitted to the reference, and who had not appeared in the cause, and because the report did not show the exact sum due. He gave notice of an application to the Court at Special Term for the relief demanded in the complaint. The defendants did not appear to oppose the motion, and the Court made an order referring it to a referee to compute the amount due.

Upon the report of the referee showing the amount due as against all of the defendants, the plaintiff on a

notice of ten days, brought the cause to a hearing and obtained a final judgment for foreclosure and sale. It was held that this practice was entirely regular.

By the last clause of the 73d rule, the referee to be appointed in foreclosure cases shall be appointed by the Court; and the Court shall not appoint as such referee a person nominated by a party to the action, or his counsel.

In computing the amount due, interest may be allowed, though the amount would thus be carried beyond the penalty. The English rule, that on a bond merely, nothing could be recovered beyond the penalty, had even in England the exception where there was an accompanying mortgage. (Clark *vs.* Abingdon, 17 Vesey, 167.)

The rule in our Court was definitely settled in Mower *vs.* Kip (6 Paige's Rep., 88), reversing a decision of the Vice-Chancellor who had held that the Master could not go beyond the penalty. (2 Edw. Rep., 165.)

The referee may allow to the mortgagee his payments for taxes and expenses; but not for the premium of insurance, unless paid with the sanction of the mortgagor or party entitled to the equity of redemption. (Faure. *vs* Winans, Hopkins' Rep., 283.)

Where the principal is not due, or one or more instalments only have become due, the referee should only report the amount due for interest, or the payable instalment with the interest, stating that the principal, or remaining instalments are not due. (Brinckerhoff *vs.* Thalimer, 9 May, 1817, As. Reg. Office, N. Y.; Hoffman's Masters in Chan., 214.)

The rate of interest fixed in the mortgage is to prevail until the security is changed by a confirmation of the report and a decree.

In Miller *vs.* Burroughs (Mss. June 23, 1820), the

bond and mortgage bore interest at six per cent. The time of payment had passed. The question was, whether interest at seven per cent. should not be allowed from the date of the forfeiture.

A case from 2d Dessessaur's Reports, 170, was cited, and also Bodily *vs.* Bellamy, 2 Burrows' Reports.

The Chancellor held that interest should continue at the rate contracted for until confirmation of the report.

As with us the mortgagee has an absolute right to a sale of the property for the payment of his demand, the inquiry where infants are concerned is only, whether a sale of some part will not be sufficient to raise the amount, and if such sale would be for the infant's benefit. Sometimes the sale of the whole would be for his benefit, leaving a surplus, even if a sale of part would suffice; sometimes a sale of the whole is indispensable, as in case of one house and lot. If the whole property will not satisfy the claim, it must be sold if the whole debt is due, and generally it is for the benefit of the infant that it should be sold speedily. (Mills *vs.* Denison, 3 John. C. R., 370; Hoffman's Masters in Chan. 206, etc.)

See Form of Orders and Report, Appendix Nos. 47 and 48.

(3)—*Sale of Mortgaged Premises.* By the 73d rule of the Court, "in every judgment for the sale of mortgaged premises, the description and particular boundaries of the property to be sold, shall be inserted. And, unless otherwise specially ordered by the Court, the judgment shall direct that the mortgaged premises, or so much thereof as may be sufficient to raise the amount due to the plaintiff for principal, interest, and costs, and which may be sold separately without material injury to the parties inter-

ested, be sold by or under the direction of the sheriff of the county or a referee; and that the plaintiff or any other party may become a purchaser on such sale; that the sheriff or referee execute a deed to the purchaser; that out of the proceeds of the sale, he pay to the plaintiff or his attorney the amount of his debt, interest, and costs, or so much as the purchase money will pay of the same, and that he take the receipt of the plaintiff or his attorney for the amount so paid, and file the same with his report of sale; and that the purchaser at such sale be let into possession of the premises on production of the deed."

The Statute of May 4, 1869, Ch. 569, § 1, directed that all sales of real estate made in the City and County of New York under the judgment of any Court of record (except in particular cases or where the sheriff was a party), should be made by the sheriff of the county. Section 2 regulated his fees in cases of foreclosure.

In Gaskin *vs.* Meek (42 N. Y., 186) this provision was held unconstitutional, as not being within the scope of the title, but embracing a subject entirely different.

As to whether the 4th section regulating the fees of referees in partition cases is invalid, see *post* chapter viii., Partition.

For the Form of a Judgment of Sale, see Appendix No. 49.

The 74th rule also directs, that where lands in the City of New York are sold under a decree, order, or judgment of any Court they shall be sold at public auction, between twelve o'clock at noon and three in the afternoon, unless otherwise specially directed.

"The notice of the sale of lands lying in any of the cities of this State in which a daily paper is printed, except when a different notice is required by law, or

by the order of the Court, shall be published in one or more of the daily papers of that city, for three weeks immediately previous to the time of sale, at least twice in each week.

"When lands in any other part of the State are directed to be sold at auction, notice of the sale shall be given for the same time and in the same manner as is required by law on sales of real estate by sheriffs on execution." (*Ibid.*)

See for these provisions, 2 R. S., 269, §§ 34, 35.

By the Judiciary Act of 1847, § 77, it was provided that any matter before referred to a clerk, master, or referee, might be referred to a clerk, County Judge, or other suitable person or persons, with the same power as heretofore possessed by such officer or person.

The 287th section of the Code, was amended in 1851 with this added clause: "Real property adjudged to be sold must be sold in the county in which it lies, by the sheriff of the county, or by a referee appointed by the Court for that purpose, and thereupon the sheriff or referee must execute a conveyance to the purchaser; which conveyance shall be effectual to pass the rights and interests of the parties adjudged to be sold."

This clause is under the title "Of the Execution of the Judgment in Civil Actions."

The sale must be made in the county in which the lands are situated unless otherwise directed by the Court in the decree. (2 R. S., 193, § 163.)

It is proper to insert the title of the cause in the notice of sale by stating the names of the first plaintiff and first defendant at length, and adding the words "and others" where there are several parties, for the purpose of attracting the attention of those interested. (Ray *vs.* Oliver, 6 Paige, 489.)

It has been held, under the 74th rule, that where

there was a notice of sale for the 28th of December published on the 9th and 12th in one week, on the 16th and 19th in another, and on the 23d and 26th of the third, this was sufficient, though twenty-one days had not elapsed. (Chamberlain *vs.* Dempsey, 22 Howard, 356.)

So in Olcott *vs.* Robinson (21 N. Y. Rep., 150) it was held to be a sufficient notice of the sale of real estate on an execution, to post it as required for forty-two days previous, and publish it in six successive numbers of weekly newspapers, although the first publication may be less than six weeks prior to the sale.

*(C)*—By the 75th rule, where mortgaged premises or other real estate directed to be sold consists of several distinct lots or parcels, which can be sold separately without diminishing the value thereof on such sale, it shall be the duty of the sheriff or other person conducting such sale, to sell the same in separate lots or parcels, unless otherwise specially directed by the Court. But if the sheriff or other person is satisfied that the property will produce a greater price if sold together, than it will in separate lots or parcels, he may sell it together, unless otherwise directed in the order of sale."

By the former practice, unless the matter was very plain, as in case of a single house and lot for example, the Master gave notice to the parties, and satisfied himself by affidavits or witnesses as to the most judicious course to be pursued. (Hoffman's Masters in Chancery, p. 215.)

And if he divided the property into parcels, in expectation that some would be adequate, he might either advertise these only, and if they proved insufficient, advertise other portions, or might advertise the whole, and stop the sale when a sufficient sum had been raised.

By the 6th section of the statute (2 R. S., 546) "if the premises consist of distinct tracts, farms, or lots, they shall be sold separately, and no more shall be sold than shall be necessary to satisfy the amount due on the mortgage, with interest and the costs and expenses." But this provision is contained in the chapter as to foreclosure by advertising.

And in Cunningham *vs.* Cassidy (17 N. Y. Rep., 276) a similar direction as to sales under execution was held to be directory only. It made a sale voidable at the instance of a party aggrieved, but not void.

The case of Ellsworth *vs.* Hansford and others, though arising under the statute as to foreclosure by advertisement, contains rules applicable to the present subject. The premises were described in the mortgage as one tract. A junior incumbrancer requested a sale in parcels and offered to bid the amount of the debt, costs, and expenses, for a specified parcel, so situated that it could be conveniently sold and conveyed separately. The mortgagee was held not justified in selling the whole amount in one parcel.

*(D)*—The referee should prepare terms of sale, with a copy of the boundaries or description of the premises inserted in or attached to it, stating fully all the conditions on which it is to made. It is customary in New York to provide in it that all the taxes or assessments, of which the purchaser shall produce proofs and furnish receipts before the delivery of the deed, will be paid out of the purchase money. (See the Terms, Appendix No. 150.)

The terms should be signed by the purchaser. It has been stated that sales by a Master are not within the statute of frauds. (Sugden, Law of Vendors, 41.) In the Attorney-Gen. *vs.* Day (1 Vesey, Sen., 221, and Belt's Supp., 115) Lord Hardwick said: That pur-

chases before a Master are certainly out of the statute; that he should not doubt carrying a sale into execution, without a subscription of the buyer, *after confirmation of the Master's report* that he was the best purchaser.

The auctioneer is the agent of both parties, and his memorandum of sale is sufficient to bind the purchaser. (McComb *vs.* Wright, 4 John. C. R., 650.)

The referee must attend in person. He can not depute another to conduct the sale. (2 John. Ch. Rep., 154.)

*(E)*—The referee may adjourn the sale on consent of the parties, or for good cause shown. These applications usually come from the mortgagee, but in many cases an adjournment would be warranted even against his will. If unavoidable circumstances prevented the attendance of a person who would bid beyond the debt due, the adjournment should be allowed on the referee being satisfied of the fact.

In Breese *vs.* Busby (13 Howard, 485) the rule of the Court of Chancery was recognized, that if a party has a lien upon some parcels covered by a mortgage, those parcels remaining in the mortgagor shall be first sold. The party may insist upon this at the sale, although he has not appeared in the suit.

The adjourned day should be announced at the time of the adjournment, but if a party's conduct has prevented this, it will be sufficient if the day is duly advertised. (Lafarge *vs.* Vanwagenen, 14 Howard, 54.)

If the sale has been commenced, and there is a *bona fide* bidder, it may be doubted whether an adjournment can be had without his consent, or an advance by the mortgagee, for example, and his consent. The advertisement seems to be a contract of the Court with every bidder, a stranger to the suit, that he shall have

the property, unless there is a fair advance upon the sum offered by him. He must be subject to the rules of the Court as to ordering a resale, or opening biddings if any rule prevails on that point in our Court.

*(F)—Deposit.* It has long been a practice to insert a clause in the Terms of sale, that a deposit (generally ten per cent.) shall be paid down; and that the biddings will be kept open until this is done. The result is, that if such deposit is not made, the sale may be resumed. Hoffman's Masters in Chan., 220.) In one case, the bidder refusing to make the deposit, the property was set up again after the lapse of a few minutes. In another, under special circumstances, notice was given that the sale would be resumed on an adjourned day, unless the deposit was duly made. The practice in Ireland is, to procure an order, on the officer's certificate, that the lands be set up again to be sold.

The plaintiff or any other party may become a purchaser at the sale. (Rule 73.) This is part of the judgment for sale, aud has long been the settled practice of the Court in this State.

*(G)—Opening Biddings.* The English practice allows the opening of the biddings, that is, setting aside the first purchaser and letting in another, at any time before the confirmation of the report of sale. But the sum offered in advance must bear a considerable proportion in price beyond the last bidding; the costs of the last bidder must be paid, and other termsmay be imposed. (Hoffman's Masters in Chancery. 224.)

The Chancellor in Williamson *vs.* Dale (3 John. Ch. R., 392) observes, that this practice had not prevailed here, and doubted its utility. In Lansing *vs.* McPherson (3 John. Ch. Rep., 426) he made such an order in a special case. "The plaintiff, the mortgagee, became the purchaser at the sum of $450; no report

had been made, nor deed executed. A defendant petitioned to open the biddings, offering an advance of fifty per cent. It was so ordered, on the party depositing the advance of fifty per cent., and paying the costs of the plaintiff upon the former sale."

In Kellogg *vs.* Howell (62 Barbour, 280) it was held that a sale will not be set aside in the absence of fraud, surprise, or well-grounded misapprehension, because a higher price may be anticipated on a resale.

Chancellor Walworth in Duncan *vs.* Dodd (2 Paige, 99) states the reasons against adopting the English practice upon the subject; and his views are approved in Collier *vs.* Whipple (13 Wendell, 224). Yet in the former case when the property was the sole dependence of two infants, and had been sacrificed through the neglect of the mother and step-father, and an advance of fifty per cent. was offered, it was followed. (See also Lefevre *vs.* Lavermay, 22 Barbour, 167.)

In Stryker *vs.* Storm (1 Abbott, N. S., 424) it was held that a sale will not be set aside merely because the guardian of infants interested was prevented by accident from attending. It must be shown that in consequence thereof, the property sold at a less price than it would otherwise have done; and that the difference to be expected on a new sale will be of real advantage to the infants.

*(H)*—But there are many cases in which a resale will be directed, apart from the question of an advance of price.

Thus in Gould *vs.* Libby (24 How., 440) it is declared that a resale will be ordered where there has been any fraud or collusion to prevent a fair competition, or parties were prevented from attending by erroneous or deceptive representations, or by sickness or inevitable accident.

In Murdock *vs.* Empie (9 Abbott, 283) the property was sold considerably below its actual value; and the representations of an agent had influenced a defendant not to attend and bid. The statement was, that a person intended to purchase at a price about its value. But the conditions were imposed of the return of the deposit, the disbursments including auctioneer's fees, and $100 for fees in examining the title; and that the defendant file a bond with two sureties that at least $14,000 be bid at a resale, with the expenses of such resale, and also should pay the costs of the motion.

See further the case of King *vs.* Platt (37 N. Y. Rep., 155), and Kellogg *vs.* Howell (62 Barbour, 280), where the subject was carefully examined. The general rule was affirmed, that a sale will not be set aside in the absence of fraud, surprise, or well-grounded misapprehension, merely because a higher price may be reasonably expected on a resale. Resales will be more readily ordered where the plaintiff or mortgagee is the purchaser than in cases of third persons.

*(I)—Substitution.* Our Court has recognized the practice of allowing a substituted purchaser to take the conveyance. It will be subject, however, to any equitable rights or liens of third persons, as against the original purchaser, which had become vested before the assignment of his bid. (Proctor *vs.* Tamar, 5 Paige, 619.)

Where the original purchaser had entered into a contract of sale of the premises with another, and had died, and his heir was absent, the Court ordered a conveyance to the substituted purchaser, and the money to be brought into Court. (Pierce *vs.* Pierce, 7 Simon's Rep., 138.)

By the English practice, there must be an order on

notice to the parties to the suit, the consent of the purchaser, and an affidavit that there was no under bargain by which the purchaser was to have a sum of money for the substitution. The order makes a deposit or payment, a condition. (See Hoffman's Masters in Chancery, p. 229.)

*(J)—Payment of Incumbrances, etc.* Sometimes the property is sold subject to a specific incumbrance, mentioned in the terms of sale; but ordinarily it is sold free from incumbrance. In such a case, the purchaser has a right to have his money first applied in discharge of legal charges upon the premises.

In Lawrence *vs.* Cornell (Mss. 8 August, 1820, Masters in Chancery, p. 227) after a sale by a Master, it was discovered, that the property had been sold to pay an assessment, which purchase was redeemable, and that there was an arrear of taxes due. Certificates of these facts with the amounts due were laid before the Master, signed by the Street Commissioner and Collector, with a request for a report of sale and that these charges might be stated in it, which was done. In a petition that the charges might be extinguished out of the purchase money, it was stated that the premises were sold as free from incumbrances. This was uncontradicted. The order was that the Master pay to the purchaser under the assessment, the amount due him with the interest payable upon a redemption, and also the arrears of taxes with the interest, and bring the residue into Court.

In Easton *vs.* Pickersgill (55 N. Y., 310) the judgment of foreclosure and sale contained this clause, "That out of the moneys arising from such sale, after deducting his fees and expenses on such sale, and any lien or liens upon such premises at the time of such sale, for taxes, assessments, or prior mortgages, the

said referee pay to the plaintiff or his attorney the sum of $ , adjudged to the plaintiff for his costs, etc."

By an article of the terms of sale, "All taxes, assessments, and other incumbrances which at the time of sale are liens or incumbrances upon said premises, will be allowed by the referee out of the purchase money, provided the purchaser shall previous to the delivery of the deed, produce to the referee proof of such liens, and duplicate receipts for the payment thereof."

The Court held that the clause as to allowing out of the purchase money what the purchaser must pay for taxes, etc., was reasonable. The referee could thus safely discharge his duty. It had been the practice for years to insert such a provision in the terms of sale. The referee awaits the production to him of the proof of liens, and is to pay them out of the moneys in hand upon receiving the vouchers of payment by the purchaser. (Post *vs.* Leet, 8 Paige, 337.)

But the referee must deduct the amount of liens known to him, though the purchaser neglect to produce proof of them. He is excused from searching himself for liens; but if there are any within his knowledge, he must apply the money in payment.

*(K)—Reference as to Title.* A purchaser by bidding under a judgment for sale of the premises, submits himself to the jurisdiction of the Court as to his contract. This has been termed a contract with the Court. Hence, on the one side a suit for performance is needless; and on the other, he may ask for an inquiry as to title, or any matter which may free him from the agreement.

An application may thus be made for a reference to inquire into the title.

The order should contain an authority to require

the production of deeds, etc., and that an abstract of the title be laid before the referee. For the Form, see Appendix No. 50.

Such an order may be made on the motion of the purchaser with a view to be discharged, or by the other party with a view to enforce the contract. (Fowler's Ex. Pr., 319; 1 Turner's Pr., 225; and particularly the case of Sir William Yea, 2 Fowler, 318; cited Hoffman's Masters in Ch., 235.)

The more general course, however, taken by the party to compel the completion of the purchase, is, to move for an attachment; when the purchaser upon a suggestion of a reasonable doubt may have the reference.

The abstract being laid before the referee, with the deeds and other instruments, and statement of facts, such as death and descents, on which the title depends, the purchaser is to have a reasonable time to examine them and then to file his objections.

It is not absolutely necessary that the deeds, etc., should accompany the abstract. The practice of the Masters was sanctioned by Lord Thurlow of leaving an abstract only. The vendee could then call for the title-deeds, etc., if he desired to examine them. (Poole *vs.* Shergold, 1 Coxe's cases, 180.)

The report, if favorable, states that a good title can be made by the means specified in it. Thus in Shapland *vs.* Smith (1 Br. Ch. Rep., 74; 2 Turner's Pr., 146) the report was, that the plaintiff, together with certain trustees and mortgagee, could make a sufficient conveyance by lease and release, under a good title in fee. And in Coffin *vs.* Cooper (14 Vesey, 205) the Lord Chancellor said, "That where the Master's report is, that by getting in a term, or obtaining administration, the vendor will have a title, the

Court will put him under terms to procure it speedily."

Exceptions may be taken by the English practice to a report of title. (Harford *vs.* Purrier, 1 Mad. Rep., 533.) We presume the 39th rule governs our course.

It is well settled that the Court will not compel a purchaser to take a title, where a reasonable doubt exists as to it, even if in its own judgment the better opinion be that the title is good. (Abel *vs.* Heathcote, 2 Vesey, jr., 100; Stapleton *vs.* Scott, 16 Vesey, 272.)

If the report is against the title, the purchaser moves upon notice and a copy of the report, that he be discharged, and his deposit returned.

The general rule is also that he be paid his costs. Even if a good title is ultimately made, yet if it was defective at the time of the purchase, but the difficulty has been removed, costs may be given to the time of the removal. With this view, it is made part of the order, that the Master inquire at *what time* the title could be made. (Jennings *vs.* Hopton, 1 Mad. Rep., 211.) If the objection is frivolous the purchaser should pay costs, but if it is such as justly entitles him to the opinion of the Court, he will be exempted from costs, although he fails. A party failing can never receive costs. (Thorpe *vs.* Freer, 1 Mad. Rep., 466.)

Where the wife of a mortgagor has not joined in the mortgage and has an inchoate right of dower, the making her a party, without allegations that the mortgage is prior, or hostile to her interests, does not affect that interest, nor does the clause foreclosing the defendants of all rights. (Merchants' Bank *vs.* Thompson, 55 N. Y. R., 7.)

A foreclosure suit is not the proper mode to liti-

gate rights claimed in priority or in hostility to a mortgage. (*Ibid.*)

Mere lapse of time is not a bar to specific performance. Where the delay is unreasonable or not excused, or where an intermediate and material change of circumstances detrimental to the interests of the party has arisen, he will be relieved.

Interest was only to be paid upon the purchase money from the time a good title could be made. (*Ibid.*)

The parties can elect to consent to a discharge of the purchaser, upon forfeiture of the deposit, or proceed against him to compel the completion. It was formerly the rule that this forfeiture was the only redress. He could not be compelled to complete, if he was willing to do this. (Saville *vs.* Saville, 1 P. Wms., 745, and cases cited.)

But it is now settled that the Court will proceed by attachment to enforce performance. In Landsdown *vs.* Elderton (14 Vesey, 312) this was finally settled.

In the executors of Mather *vs.* Cortlandt (2 John. C. Rep., 505), under a decree of sale, S. C. became the purchaser for $1,600, and paid $50 deposit. The sale was confirmed by order and the Master directed to execute a deed, receive the purchase money, etc. The deed was tendered, and payment demanded. The purchaser refused to accept and pay. An order was then made, that he complete the purchase by paying the balance with interest from the time of the report of his being the bidder, or that he show cause on the —— day of ——, why an attachment should not issue against him.

The Chancellor said: "That he had no doubt of the power of the Court to coerce a purchaser where the conditions of sale had not given an alternative.

That in this case, the forfeiture of the deposit would not be sufficient either as a punishment to the one party, or a satisfaction to the other."

It was ordered, that the purchaser pay the money in six days, or that an attachment issue.

*(M)—Deed, delivery of* By rule 16, whenever a sheriff or referee sells mortgaged premises under a decree, or order, or judgment of the Court, it shall be the duty of the plaintiff before a deed is executed to the purchaser to file such mortgage in the office of the clerk unless such mortgage has been duly proved or acknowledged, so as to entitle the same to be recorded; in which case, if it has not been already done, it shall be the duty of the plaintiff to cause the same to be recorded at full length in the county or counties in which the lands so sold are situated, before a deed is executed to a purchaser in the sale, the expense of which filing or recording and the entry thereof shall be allowed in the taxation of costs, and if filed with the clerk he shall enter in the minutes the filing of such mortgage, and the time of filing. But this rule shall not extend to every case where it shall appear by the pleadings or proofs that the mortgage has been lost or destroyed.

The referee, having ascertained that this has been complied with executes and delivers his deed.

For the Form of a Deed, see Appendix, No. 51.

*(N)—Report.* By rule 73 no report of sale shall be filed or confirmed unless accompanied with a proper voucher for the surplus moneys, and showing that they have been paid over, deposited, or disposed of in pursuance of the judgment. (Appendix, 52.)

*(O)—Possession.* By the Revised Statutes (2 R. S., 199, Edmonds' Ed., § 152) the Court shall not only have power to decree and compel the delivery of the

possession of the mortgaged premises to the purchaser thereof, but on the coming in of the report of sale, may direct the payment by the mortgagor of any balance of the mortgage debt.

Before this act, Chancellor Kent had asserted the power of the Court to put a purchaser under its decree into possession. (Kershaw *vs.* Thompson, 4 John. C. R., 609.) He cited Deve *vs.* Deve (Dickens' Reports, 617), and says there could be no doubt upon the point, if it had been part of the decree that possession was to be delivered. He concludes that this omission was not decisive.

In Lynde *vs.* O'Connell (12 Abbott's Rep., 286) the judgment contained the usual clause that the purchaser be let into possession on production of the deed of the Referee.

It was held, that the judgment could be executed, and a sale made, notwithstanding the death of the plaintiff in the action after the judgment.

It was also held, that the purchaser was entitled to an order for a writ of assistance *ex parte.* The case of the N. Y. L. Ins. and Fire Co. (8 Howard 39) was recognized as an authority for this. See also Bell *vs.* Birdsall, 19 Howard, 491, in which it was decided that the Court would give possession to the purchaser as against all the parties to the action, and as against those who had come into possession under any party during the suit. But it will not interfere with the possession acquired by one after the purchaser has received his deed, and conveyed the property to another.

SECTION II.

*Surplus Moneys.*

By rule 73, "all surplus moneys arising from the sale of mortgaged premises under any judgment shall be paid by the Sheriff or Referee making the sale, within five days after the same shall be received and be ascertainable, in the city of New York, to the Chamberlain of the said city, and in other counties to the Treasurer thereof, unless otherwise specially directed, subject to the further order of the Court; and every judgment of foreclosure shall contain such directions, except where other provisions are specially made by the Court."

"No report of sale shall be filed or confirmed unless accompanied with a proper voucher for the surplus moneys, and showing that they have been paid over, deposited, or disposed of in pursuance of the judgment." (*Ibid.*)

And the 165th section of the Statute (2 R. S., 192) directs, that if there be any surplus, it shall be brought into Court, for the use of the defendant, or of the person who may be entitled thereto, subject to the order of the Court.

By the 77th rule, on filing the report of the sale, any party to the suit, or any person who had a lien on the mortgaged premises at the time of the sale, upon filing with the clerk where the report of sale is filed a notice stating that he is entitled to such surplus moneys, or some part thereof, and the nature and extent of his claim, may have an order of reference to ascertain and report the amount due to him, or to any other person, which is a lien on such surplus moneys, and to ascertain the priorities of the several liens thereon,

to the end that on the coming in and confirmation of the report on such reference, such further order may be made for the distribution of such surplus moneys as may be just."

"Every party who shall have appeared in the cause, or who shall have filed such notice with the Clerk previous to the entry of the order of reference, shall be entitled to service of a notice of the application for the reference, and to attend on such reference, and to the usual notice of subsequent proceedings relative to such surplus. But if such claimant has not appeared or made his claim by an attorney of this Court, the notice may be served by putting the same into the post office, directed to the claimant at his place of residence, as stated in the notice of his claim."

It has been held that the complainant in a foreclosure suit need not set forth in his complaint every claim upon the property he is entitled to. He may come in after a sale to prove other demands than that upon the mortgage.

In Field *vs.* Hawkins (9 Howard, 75) this point was fully examined by Justice Harris, and while it scarcely amounts to a positive decision, it is, we deem, impossible to question the correctness of his conclusion. The plaintiff, under the 136th rule of 1844, was entitled to make a claim upon the surplus, the same as a defendant or any other person.

It has been held at Special Term (10 Howard, 333, King *vs.* West), that under a reference of this character, the claims to be inquired into are liens which subject the property to be sold under execution. Equitable claims not matured into such liens under which the property could be charged and sold, were not of this nature. The question arose upon the claim of

judgment creditors of a husband alleging that property though in her name was in fact property of the husband.

In The Mutual Life Insurance Co. *vs.* Bowen (47 Barbour, 618) there were four mortgages upon the property. The two elder were paid out of the proceeds, and an order was had to ascertain the liens on the property by the third mortgagee. The holder of the fourth mortgage offered evidence to prove that the third mortgage was usurious.

The Referee excluded the evidence. He reported that the mortgage was the first lien on such surplus, the amount due, and that the mortgagee was entitled to an order directing the Chamberlain of the city of New York to pay the whole of the surplus to such third mortgagee, in part payment of the amount due.

Exceptions were heard at Special Term, and the report confirmed, and an order for that payment made.

On appeal, the General Term held, that it was open to the fourth mortgagee to question the validity of the third mortgage. That the latter was plainly usurious, and that the questions and the rights of the parties resulting from its determination could be settled upon the reference.

Justice Clerke adhered, however, to the views he had expressed in King *vs.* West (10 Howard, *ante.*)

The order at Special Term was reversed. This case of King *vs.* West and Husted *vs.* Dakin were cited, and held not to be at variance with the conclusion arrived at.

In Husted *vs.* Dakin (17 Abbott, 137) the rule was adverted to, that by a sale of land under a judgment the lien is extinct, and the right to redeem under it

gone. Hence there could not be a claim on a surplus.

A referee under the usual order if he found a lien regular and vested on record, had no right to go behind it, and inquire into the questions of its irregularity, fraud, or injustice.

The Court may be applied to for the purpose of such an investigation.

As to the claim of a widow it is settled that the surplus stands in place of the land as to all liens or vested rights therein. Her claim is therefore to be admitted. (Mathews *vs.* Dungee, 17 Abbott, 256.)

The executors of a deceased debtor were sued by a creditor, and a decree of the Surrogate was made in his favor, but not docketted. There was a surplus fund arising from a foreclosure sale. The widow and others as devisees claimed it.

It was held that the creditor could support a claim to the surplus as against such persons.

If there is a surplus fund, and no other creditor entitled to priority, and indeed no debt of any kind, the Court will allow the creditor who has proved his demand since the death to claim against a legatee. The Statute provides that the proceeds of the estate go to the next of kin only after all the debts are paid. A Court of equity would not dispose of a fund under its control iu violation of this provision.

A tenant for years under a lease given after a mortgage, if the latter is foreclosed, has a claim upon the surplus money to the value of the unexpired portion of the term determined by the foreclosure. (Clarkson *vs.* Skidmore, 2 Lansing's Rep., 238.)

*Costs, etc.*—Although a percentage can not be allowed under the Code, yet the Court could allow a suitable compensation for costs and disbursements out

of the fund. (The N. Y. L. Ins. Co. *vs.* Vanderbilt, 12 Abbott, 458.)

The practice as shown in several of the cases cited is for the referee to make his report, with the evidence. The report is proved and becomes absolute unless excepted to. Then an order upon notice is applied for at Special Term, for distribution according to the report. The exceptions, if any, will be then heard.

We have seen that in some cases a motion to confirm the report has been made. The above practice seems the most regular.

For Forms of Order and Report, see Appendix, Nos. 53 and 54.

### *Under Statute of* 1868.

By a Statute of 1868, chapter 808, as to foreclosures by advertisement it was enacted:

SECTION 1. All surplus moneys arising upon sales of premises had in pursuance of the provisions of title fifteen, chapter eight, part third of the Revised Statutes, entitled "Of the foreclosure of mortgages by advertisement," shall be subject to the jurisdiction and order of the Supreme Court, which may control and dispose of the same according to the rights o those interested therein and as is hereinafter provided.

SEC. 2. Any attorney at law or other person who, after the passage of this Act, shall hold or make any sale of premises in pursuance of said title, and who shall receive any surplus moneys thereon, shall pay over the same within ten days from the time of the receipt thereof by him to the county clerk of the county in which said premises, or any part thereof, are situated. Any attorney at law or other person who

at the time of the passage of this Act has in his possession any such surplus moneys undisposed of may within sixty days after the passage of this Act, if the same shall not by that time have been legally disposed of, pay over the same to the county clerk of the county in which the premises sold, or any part thereof, are situated.

SEC. 3. Any person who had a lien on or an interest in the mortgaged premises at the time of the sale may, within twenty days after the day of the sale on which said surplus moneys arose, file in said county clerk's office a notice stating that he is entitled to the whole or some part thereof, and the nature and extent of his claim, and may after the expiration of the said twenty days, and upon notice to all persons upon whom a notice of said sale was served, and to all persons who have filed in said clerk's office a notice of claim to said moneys, apply to the Supreme Court at Special Term thereof, to be held in the district in which said premises, or a part thereof, are situated, for an order of reference to ascertain and report the amount due to him or any other person which is a lien upon such surplus moneys, and to ascertain the priorities of the several liens thereon, and on coming in and confirmation of the report on such reference such further order shall be made for the distribution of such surplus moneys as may be just. Such notice of application shall be served and the service thereof proven, as in part second, title fifth, of the Code of Procedure, entitled "Of the manner of commencing civil actions," provided for the service of a summons and for the proof of such service.

SEC. 4. Except as herein otherwise provided all proceedings under this Act shall be such as are prescribed from time to time by the Supreme Court rela-

tive to the surplus moneys and the distribution thereof, which have arisen upon sales ordered by that Court.

The practice and proceeding before stated will be a sufficient guide here.

SECTION III.

*Redemption.*

Perhaps it is not stating the rule too broadly to say, that any one who has a legal estate or recorded lien, or an equitable interest in the property, is entitled to redeem.

The right is in the mortgagor and all claiming under him—the ground being an interest in, or a lien on land. It belongs to a volunteer; to the tenant of a mortgagor; to judgment creditors; tenants by elegit, statute merchant or staple in England; to the guardian of an infant, or committee of a lunatic; to the dowress, jointress, tenant by courtesy, or subsequent mortgagee. (Powell on Mortgages, Vol. 1, 261, *et passim.*)

The form of the decree, as far as a reference is concerned, is generally, That it be referred to —— to take an account of what is due to the defendant A B for principal and interest upon the mortgage mentioned in the pleadings; and that he also take an account of the rents and profits of such mortgaged premises received by the said defendant, or by any person or persons by his order, or for his use, or which without his wilful default (or with ordinary care and diligence) might have been received therefor. And what shall be coming on account of such rents and property shall be deducted from what shall be found due to such defendant for principal and interest. And in case it

be found that the said defendant has been in possession of such premises, or any part thereof, then a rent shall be set upon the same, and the account be taken accordingly. And in taking the account there shall be made to the parties all past allowances, and particularly for all necessary repairs and *lasting* improvements which have been made by such defendant on the said premises. (Eq. Drft., 648.)

In some cases it has been made part of the decree that interest be computed on the amount expended for lasting improvements. (Delabere *vs.* Bridges, 1773; Quarrel *vs.* Beckford, 1st Mad. Rep., 259.)

In Gubbings *vs.* Creed (2 Sch. and Lefroy, 224) the decree directed an allowance for such improvements as could be deemed beneficial to the plaintiff upon the defendant's delivering up possession, and an allowance for the expense of planting the trees and orchards alleged to have been planted, or so much thereof as are in a good condition, and a benefit and advantage to the plaintiff. An inquiry was also to be made as to the value of the timber cut down, the defendant to be charged with it and interest.

In Barret *vs.* M'Aughry in the Court of Chancery, in New York, 1st January, 1821, the decree was similar to the above form; the direction as to rents and profits was, what he had received, or might with ordinary care and diligence have received.

We think that under the 73d rule the referee in such a case should be appointed by the Court. The phrase is "in foreclosure cases." The bill to redeem operates as a bill of strict foreclosure, if the money is not paid as adjudged. The dismissal of such a bill is equivalent to a decree of foreclosure. (Bishop of Winchester *vs.* Payne, 11 Vesey, 199.)

The plaintiff should bring in a charge before the

referee stating the rents and profits received, or might with ordinary diligence have been received, if the decree so adjudge; what the party should be charged with as a fair rent, if in possession of the premises, and any claim upon the ground of waste or spoliation, and other item of charge which may properly be demanded.

When the evidence in this branch has been gone through, the defendant should file a discharge containing a statement of the amount due on the bond and mortgage expenditures in repairs and allowances claimed by him. This was the old mode of proceeding and is sanctioned by the 77th rule.

The report is filed and notice given under the 39th rule, and becomes absolute, unless excepted to within eight days.

For the Forms of the Order of Reference, Report, and Final Judgment, see Appendix, No. 55

*Rests.*

The general rule of the Court in England was formerly to direct that the account of the mortgagee in possession be stated with annual rests, the object of which was to apply the annual excess of rents and profits beyond the interest, when such existed, to the reduction of the principal.

Lord Hardwick, in Gould *vs.* Tancred (12 Atk., 553), speaks of this as the general rule of the Court; but observed that this was often attended with great hardships to a mortgagee, where he could only satisfy his debt by parcels, and was a bailiff to the mortgagor without a salary and subject to an account. That the Master was not for every small excess of interest to sink the principal.

In Davis *vs.* May (Cooper's Cases, 236) the mortgage was made in 1793, for £700. From 1793 to 1799 nothing was paid for principal or interest. In 1799 the mortgagee was let into possession. The rent exceeded the annual interest, so that by 1809 the whole interest was paid, the principal, £700, alone remaining due. Since 1809 to 1813 the mortgagee received the rents, which in each year were three or four times as much as the interest.

It was insisted by the plaintiffs in a bill to redeem, that from 1809 the annual excess of rent should be applied to sink the principal, and for that purpose annual rests should be made. Gould *vs.* Tancred and two other cases were cited.

On the other side it was urged that the proper mode was to compute interest on the £700 from the date of the mortgage, and to ascertain the amount of rents received and to deduct such amount from the aggregate of principal and interest, that the register had searched his books for three years past, and out of ten decrees found only two (those cited) where annual rests were ordered. The usual course was not to direct such rests, but only when the mortgagor would be materially injured without it. The Master of the Rolls adopted this view, and refused to direct rests.

In Shepherd *vs.* Elliott (4 Mad. R., 264), when the mortgagee took possession, the interest had never been in arrear. Annual rests were ordered, the excess to be applied to the principal.

In Magrave *vs.* Lunn (2 Vernon, 323 and 578, Raithby's Edition) an estate was settled to raise the sum of £3,000 for daughters. The remainder-men allowed them to go into possession. Judgment creditors of the settlor filed their bill for satisfaction, and an account of the rents and profits, etc. The decree

as finally settled was that the surplus rents, after paying the interest, should be applied to the principal when £1,000 was raised.

When a mortgagee in possession has been fully paid his principal and interest he becomes a naked trustee for the mortgagor, and should be charged with interest on his annual balances.

In Quarrel *vs.* Beckford (1 Mad. Rep., 269) the Vice-Chancellor of England examined the point with great care, and declared this to be the result of the authorities.

Upon this subject we should remember on the one side that a mortgagee is not bound to accept payment of his demand in parcels, or that a tender of any amount less than the whole would be legal. But if he agree to accept this mode of securing payment by a possession and reception of profits, it is not just that when a large part of the principal is received, that his interest should continue the same. This again must somewhat depend on the amount of the debt. To compel, for example, an application of an excess of $50 upon a debt of $500 might be unjust, while to compel the application of $500 upon a demand of $5,000 would be just. The mortgagor is relieved; and the mortgagee may be deemed able to invest the sum.

"A mortgagee in possession is not obliged to lay out money any further than to keep the estate in necessary repair; but if he has expended money in support of the right of the mortgagor to the estate, where his title has been impeached, he may add that to the principal of his debt, and it shall carry interest." (Lord Hardwick, Godfrey *vs.* Watson, 3 Atk., 517.)

The Court is cautious in allowing for real improvements which may clog the power of the mortgagor to redeem. (Viners Abrid., Tit. Mortgages, XI.)

In Moor *vs.* Cable (1 John. Ch. Rep., 385) the mortgagee in possession had cleared part of wild land. On a bill to redeem he was not allowed for the expense; but the order was that the Master compute the principal and interest due on the mortgage, and charge the defendant with the rents and profits received, except such as shall appear to have arisen from his expenditures in improvements; that he allow for necessary repairs, if any, but not for clearing the land.

In a case in Massachusetts it was held that a mortgagee should be allowed for repairs, but not for improvements. He was not allowed for the cost of an aqueduct, it not appearing that the property could not be supplied with water without it. (Russell *vs.* Blake, 2 Pickering, 505.)

When upon taking possession the premises were found in so ruinous a condition that no rent could have been obtained for them, and repairs were allowed on the ground of necessity, and they were substitutions of the former condition, the occupation rent was charged only from the time of the repairs being completed. (Marshall *vs.* Cane, 824, cited, 3 Powell on Mortgages, 957*a*.)

When the mortgagee goes into personal possession he is chargeable with the highest rent that could be obtained. (Marany *vs.* O'Dea, 1 Ball and Beatty, 118; Seaton's Forms of Decrees, 189.)

A tender of the amount due will in general stop the interest, whether made after forfeiture or before. The question is whether the tender was refused upon reasonable grounds. (See the old cases in Hoffman's Masters in Ch., p. 249, *et seq.*)

In the case of R. R. B. and others *vs.* J. McV. and others, in 1821, the case was referred to the writer as Master in Chancery, and the following is a summary of

the points decided in the report, which, on exceptions, were in all respects confirmed by Chancellor Kent.

1. That an account of the amount received for rents and profits was stated on the basis of what had been actually received, or which, with ordinary care and diligence, could have been received. The reason for disallowing a charge for a larger rent than that allowed as stated.

2. That in computing the amount due on the bonds and mortgages, interest had been stopped on the —— day of ———, the day of the tender of the amount then due, the tender being then strictly made, and there being no reasonable cause for refusing redemption.

3. That as to the direction regarding the injury, waste, or deterioration of the premises, the rule was assumed to be that the mortgagee was chargeable only for waste in its technical legal sense, or wilful neglect, producing an injury and deterioration of the property, but not for a diminution of value which could be accounted for by lapse of time. That the buildings and fences were in about the same condition as when possession was taken. Then followed certain particular statements as to wood cut down, not necessary to be detailed.

4. As to the direction of the decree respecting an account of the value of the beneficial and permanent improvements which the said ——— had made in the premises, it was considered, that the rule of the Court was, that such should be paid for only according to their value at the time of the account; but the actual cost of necessary repairs should be allowed. The question was to be determined by their need for the preservation of the property in the same condition or producing the rent charged to the mortgagee.

5. Credit was given for the cost of two pieces of fence, although at the time of the account taken, out of repair and in a decayed condition, but important when made to keep up the premises at the time in a proper condition. The amount paid for taxes was allowed.

6. That by the first day of April, 1811, the receipts for rents, etc., had discharged the whole amount due, and left a small balance in the hands of the defendant. That from that time the defendant was a trustee, and was chargeable with interest on the annual balances. The account was stated with annual rests to strike the balance and interest allowed upon the same.

The exceptions to such report were overruled in November Term, 1822. (Hoffman's Masters, etc., Appendix, 355.)

The mortgagee is only bound to make such repairs as are necessary to keep the premises in proper condition and preservation. (Godfrey *vs.* Watson, 3 Atkyns, 517.)

SECTION IV.

*Strict Foreclosure.*

The strict foreclosure of mortgages is of rare occurrence in the Courts of New York. In Benedict *vs.* Gilman (4 Paige's Rep., 58) a purchaser under a statute foreclosure filed his bill to foreclose the equity of a judgment creditor and subsequent mortgagee. He was not bound to make the mortgagor or any person whose equity was already barred a party.

In Wilkes *vs.* Wells (Hoffman's Ch. Practice, vol. iii., No. 263, *A*), such a bill was supported, and a final decree made.

(See the decree in that case, Appendix, No. 56, *A*.)

The redemption in Benedict *vs.* Gilman was to be upon payment of the whole amount due upon the bond

and mortgage without regard to the amount bid on the statute foreclosure.

The rules upon taking the account upon such a bill are similar to those upon a bill to redeem, if the plaintiff has gone into possession. As to these, see *ante*, § 3. Ordinarily the party has not been in possession, and the order will be limited to the computation of the amount due and directions as to payment, etc.

In Wilkes *vs.* Wells, before cited, there had been a foreclosure of a mortgage and sale, and the plaintiff had become the purchaser and received the deed. There was an equity of redemption in the defendant, who had not been made a party, and which the bill sought to foreclose.

If the mortgagee is dead, his heir-at-law must bring the action, because the legal estate in the land is to be vested in him. The personal representative should also be a party, as the mortgage money, if paid, goes to him. (Frean *vs.* Horsley, 2 Freeman, 180; 2 Eq. Cas. Abr., 77.)

It is only necessary to make the heir of the mortgagor a party. The personal representative need not be brought before the Court. (Wadshaw *vs.* Outram, 13 Vesey, 234; Duncombe, *vs.* Hansley, 3 P. Wms., 33, *N.*)

The purchaser who files a bill against a subsequent mortgagee or judgment creditor, is not bound to make the mortgagor or any one already barred, a party to the action. (Benedict *vs.* Gilman, 4 Paige, 60.)

For the Form of a Final Decree, see Appendix, No. 56, *B.*

Where a purchaser under a statute foreclosure had made valuable and permanent improvements upon the premises in ignorance of the existence of the incumbrance, and filed such a bill, he was to be allowed the

value by any one seeking to redeem. (Benedict *vs.* Gilman, *supra.*)

If an infant is foreclosed, the English rule is to give him a day after coming of age, to show cause against the decree. It is presumed such is the rule with us. He can only show error in the decree. He can not ravel into the account nor redeem. (Mallach *vs.* Gaston, 3 P. Williams, 352; Lyne *vs.* Willis, 2 Eq. Ab., p. 11; see Badham *vs.* Odell, 4 Br. P. C., 349.)

The leading rules before stated as to the account upon a bill to redeem (*ante*, § 3) are applicable to a suit of this nature. There are some special cases which should be noticed.

In Benedict *vs.* Gilman (*ut supra*), the purchaser in possession was allowed for his permanent improvements.

If the party is in virtual possession by taking the rents, he must account for what he has received, or might, with ordinary care and diligence, have received. (Rowe *vs.* Wood, 2 Jacob & Walker, 551; Burnet *vs.* Claghry, Chancery, New York, 1821; Masters in Chancery, 242; Webber *vs.* Hunt, 1 Mad. Rep., 13.)

If he has gone into possession personally, he will be charged with an occupation rent. This is fixed at the full value. An agreement between mortgagor and mortgagee, fixing such rent, would not be supported as to other parties. They could have an inquiry. (Knowles *vs.* Chapman, Seaton Decrees, 149; Marshall *vs.* Lane, 3 Powell on Mortgages, 957, *A.*; Marany *vs.* O'Dea, 1 Ball & Beatty, 118; Webb *vs.* Rooke, 2 Sch. and Lef., 661.)

Where, upon taking possession, the premises were in so ruinous a condition that no rent could have been obtained for them, and a sum for repairs had been allowed on the ground of necessity, the Court charged

the mortgagee with an occupation rent only from the time of the repairs being completed. (Marshall *vs.* Lane, cited in Powell on Mortgages, vol. iii., p. 957, *A.*)

Rents accrued before a mortgagee takes possession, actually, or by notice to the tenants to pay to him, can not be recovered against the mortgagor. (Coleman *vs.* St. Albans, 3 Vesey, 32; Thomas *vs.* Brigstocke, 4 Russell, 64.)

By the terms of the English order of reference, the Master is to appoint a time and place at which the amount found due is to be paid. The amount is computed to a day six months after the date of the report. (See 2 Harrison's Pract., 162.)

It was once held that if the money was not paid by the time appointed by the Master, that the party was absolutely foreclosed. But now, upon the default, a further order is necessary. (Sheriff *vs.* Sharks, 1 West, 130.)

The time for paying the amount is, in England, very indulgently enlarged by the Court of Chancery, though not so in the Exchequer, nor in Ireland. (3 Powell, 999; Quorley *vs.* Knight, 8 Price, 630.)

If exceptions are taken to the report, the time for paying will be enlarged until they are disposed of. (Renvoize *vs.* Cooper, 1 Simon & Stuart, 365.)

The course of proceedings in Wilkes *vs.* Wells, in our own Court, January, 1834, was as follows: The defendant was an alleged lunatic, and a guardian *ad litem* had been appointed for him. The cause being brought to hearing, a decretal order was made referring it to a Master to report the amount due to the complainant for taxes and assessments paid by him, with the amount due upon the bond and mortgage, dated the —— mentioned in the complaint, and also an account of rents and profits received by the complain-

ant; also that his costs be taxed and specified in the report. And if the amount found due was paid within six months after service of a copy of the report and of the decree upon the guardian *ad litem*, that the complainant execute a proper conveyance of the premises, and cancel and satisfy the mortgage of record. (See the decree, Appendix, No. 56, *B*.

By the decree in Benedict *vs.* Gilman (4 Paige, 58), the defendants were to elect to redeem within thirty days after service of a copy of the decree, and were to serve a written notice thereof upon the solicitor of the complainant. If such election was made, a reference was then to be had to ascertain the amount due upon the principles of the decree. But if such election was not made, the party was to be barred and foreclosed absolutely.

By this course a reference need not be had, unless the defendant elects to redeem. Upon an affidavit of the service of the decree, and of the omission to serve a notice of such election, the final order to make the decree absolute could be had.

But if such election is made, the proceedings before the referee are such as under an interlocutory reference to take an account. The report will be filed under the 39th rule, and if it becomes confirmed, a final order may be had fixing the time for payment, with a clause barring redemption if payment is not made.

# CHAPTER VIII.

## PARTITION.

§ 1. Jurisdiction.
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§ 6. Reference as to Title.
§ 7. Liens.
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§ 10. Sale of Premises.
§ 11. Purchasers' contracts and rights.
§ 12. Report of Sale.
§ 13. Deed.
§ 14. Report of Distribution.

### SECTION I.

### *Jurisdiction.*

The origin of the jurisdiction of the Court of Chancery in England in partition suits is obscure. It was probably derived from the Statute of 32d Henry 8th, making joint tenants accountable to each other. It became a settled recognized power. (1 Vernon, 421; 2 Vesey, p. 124; Alnatt on Partition, p. 77; 1 Vesey, Jr., 552.)

This power was exercised in our own Court of Chancery before the revised statute of 1830. The act of 1813 (1 R. L., 513) regulated the proceedings. It was therein provided "That before judgment the Court shall examine and ascertain the rights, titles, and interests of the parties, plaintiffs and defendants, that the purchaser under such sale may be protected in his title acquired thereby." Thus early was the power to decree a sale established, which was unknown in the

English Court. (11 Vesey, 143; 1 Maddock's Rep., 199.)

"By the statute (2 R. S., 329, § 79) the Court of Chancery shall have the same power upon bill or petition filed in that Court, to decree partition and sales of lands, tenements, and hereditaments, as is therein given to the common law courts in like cases."

In Jenkins *vs.* Van Schaack (3 Paige, 245) it was held, that thus the Court had concurrent jurisdiction. An objection that the remedy could be had at law was not tenable. See the case of Jackson *vs.* Edwards, (7 Paige, 386) upon the point of jurisdiction and the statutory provisions in force.

## SECTION II.

### *Statutory Provisions.*

By the 448th section of the Code, "The provisions of the revised statutes relating to the partition of lands, tenements, and hereditaments, held or possessed by joint tenants, or tenants in common, shall apply to actions for such partition brought under this act, so far as the same can be so applied to the substance and subject matter of the action, without regard to its form."

It seems that the form of the action is governed by the Code; that is, the summons, complaint, and answer are regulated by it, as well as other pleadings, if any. In Croghan *vs.* Livingston (17 N. Y. R., 218) the subject was examined and the conclusion reached that the remedy of the Revised Statutes by petition was abrogated.

It was also held that the omission of a guardian *ad litem* of an infant to file his bond, was amendable even after a sale upon judgment.

The act of 1852, hereafter noticed, is severely criticised.

The provisions of § 133 as to amendments of pleadings, process, or proceeding are held applicable to the action of partition.

In the matter of Cavanah (14 Abbott's Pr. Rep., 258) the proceedings were commenced by petition, and on a report of commissioners, a sale had taken place. The purchaser objected to the title, mainly on the ground that this proceeding was no longer warranted. It was considered at General Term that the question was so doubtful, that a purchaser ought not to be compelled to take the property.

By the 81st section of the statute (2 R. S., 329) the Court of Chancery shall have the same power upon petition, or bill filed in that Court, to decree partitions and sales of lands, tenements, and hereditaments as are given to the Common law Courts, in like cases.

By the 82d section, the same notice shall be given, served, and published and verified by affidavits. Guardians of minors shall be appointed, the same rules as to parties shall apply, and the like proceedings shall be had, as hereinbefore directed, except as hereinafter provided.

The case of Sandford *vs.* White (1 N. Y. Supreme Court Rep., 647) is important upon the question as to the prevalence of the rules of the Revised Statutes. Property had been sold under a judgment in partition, and the purchaser objected to the title. In the complaint, certain persons were described as the legal representatives of K. B. and J. B., deceased, whose names are unknown to the plaintiff. Proceedings were taken under the Code by an order for publication for three months in the State paper, and also in a newspaper published in the City of New York. It was held to be

clear that the Code did not govern. In the absence of any legislation in the Code, the Revised Statutes as amended would control, and are continued as applicable to partition suits by section 448. The provision of 1830 is then stated, the amendment by an act of 1831 (page 363) and that of 1842 (page 31). A description of the premises was required to be inserted in the notice published. The purchaser was discharged.

This Act of April 12, 1842 (page 363), directed the notice to be published in the State paper, and in any other public newspaper printed in the State as the Court should direct, such publication to be continued in each of such papers once at least in each week for three weeks in succession. The form of the notice is prescribed. The Code was meant to abolish the present forms of actions and pleadings in cases at common law; that the distinction between legal and equitable remedies should cease, and one uniform course of proceding in all cases should be established.

By an act relating to the partition of lands, passed April 14th, 1852, Chap. 279, "Whenever an infant shall be possessed of real estate as tenant in common or joint tenant, the Supreme Court may authorize proceedings to be instituted on behalf of such infant for a partition and division of such real estate, and for a sale thereof, if it shall appear that such partition can not be made without great prejudice to the owners. (§ 1.) Such authority shall not be given, nor shall such division, partition or sale be directed, unless it shall be made satisfactorily to appear that the interests of such infants require such partition or sale; and the Court shall appoint a competent next friend to conduct the proceedings on the part of such infant, which next friend shall be appointed upon the like application and in the like manner, and shall give

such security and possess such powers as are specified and required in sections two, three, and four of title third, chapter one, of the third part of the Revised Statutes. (§ 2.)

Prior to this act, persons of full age only could apply for a partition. (2 R. S., 317, §1; 329, § 79; 34 Barb., 106.)

In the case of Lansing *vs.* Gulick (26 Howard's Rep., 250), the statute was examined. The infants had applied under the Code for a guardian *ad litem*, and the formalities of the Statute had not been observed. The next friend must be appointed and give security as required by the Revised Statutes on appointment of a guardian for an infant in partition suits. Clark *vs.* Clark, 21 Howard, 40, and Leigh *vs.* Smith, 13 Howard 104, were cited.

The Court must also be satisfied that the interests of the infant require such a suit.

In the matter of Marsac (15 Howard, 383), there had been an order of reference under this section. The report was merely, that it would be proper to allow the infants to prosecute an action for partition and sale of the premises. The Court held this wholly insufficient. The facts which would warrant such a conclusion should be set forth in the report, that the Court might judge whether a suit so expensive should be instituted. It should appear why a sale under the statute as to sales of infants' estates would not answer.

By an act of 1853 (Laws of 1853, chap. 238), an heir-at-law claiming lands by descent, is authorized to bring an action for partition, though not in possession, and to contest in such action the validity of any will or devise under which possession is held.

Under this act it was held in Hewlett *vs.* Wood (55 N. Y. R., 634), that the action, though specially au-

thorized by statute, had the incidents and results of an ordinary action of partition. The review of the judgment in the Court of Appeals was that prescribed by the Code, and only upon questions of law.

## SECTION III.

### *Parties to the Action.*

The parties who may bring the action are thus specified:

"When several persons shall hold and be in possession of any lands, tenements, or hereditaments as joint tenants or tenants in common, in which one or more of them shall have estates of inheritance, or for life or lives, or for years, any one of such persons being of full age, may file the bill." (2 R. S., 317, § 1.)

We have before seen that by the act of 1852, infants may bring the action, a next friend being appointed.

Any one, it is presumed, who is a seised in fee, or is a tenant for life, or for years, may bring the action, although the co-tenants have wholly different estates. Identity of rights or interests is not required.

Thus, in Baring *vs.* Nash (1 Ves. & Bea., 537), a tenant for a term of years in one-tenth of the property filed the bill against the absolute owners of the other nine-tenths; and in Willis *vs.* Slade (6 Vesey, 408), a tenant for life of a moiety, together with his children, entitled in remainder in tail, filed a bill against those entitled to the other moiety. It was well settled that the Court would sustain a bill wherever an action would lie at law. (Turner *vs.* Morgan, 6 Vesey, 498.)

A mere reversioner can not bring the action. (Striker *vs.* Mott, 2 Paige, 389.) But he must be made

a party where the owner of a present interest has also an interest in an undivided part of such reversion. (*Ibid.*)

It is no objection to a bill that there may be parties not in *esse* at the time, who may become entitled to an interest. The limitations will attach to the divided shares. (Cheesman *vs.* Thorn, 1 Edw. Rep., 630. See also, 2 R. S., 318, § 7.)

In Galleo *vs.* Eagle (1 N. Y. Supreme Ct. Rep., 124) it was held that a trustee under a valid trust for an infant until he attained twenty-one, could bring an action for a partition. He had a power to sell the premises and invest the proceeds.

The Court adverted to the restriction in section one of the statute, that the plaintiff must be of full age. The act of 1852 is referred to as enabling an infant to bring such action. But the Court held that independently of this, the trustee seised of the premises could support it.

The parties are to hold in common, that is, their interests, whatever they may be, are to come from one common source ; all are to trace title to one fountain.

And the possession is to be in common, that is, the possession of one is in recognition of, or at least not opposed to, the possession of all. The rule is, that the actual personal possession of one tenant in common is the virtual possession of all.

But there must be a community of interest in the whole property sought to be divided. Hence, if the plaintiffs have a common interest in various parcels, and no common interest with the defendants in other parcels, the action can not be sustained as to such parcels, but it may be as to all the rest.

This was so decided by Mr. Justice Ingraham of the Supreme Court in the case of Beach *vs.* The Mayor,

etc., of New York, and others, March, 1872, where the plaintiff, as to one piece of the lands had no interest at all, and where also some of the defendants claimed an adverse title to certain lands under water. Both parcels were excluded from the judgment appointing commissioners to divide.

SECTION IV.

*Contents of the Complaint.*

The complaint must particularly describe the premises sought to be divided. It must set forth the rights and titles of all the persons interested as far as the same are known, including the interest of any tenant for life or years, by courtesy or dower, and those entitled in reversion, remainder, or inheritance after the termination of any particular estate, and of every one who by any contingency contained in any devise, grant, or otherwise, may be, or may become entitled to any beneficial interest in the premises. (1 R. S., 329, § 80, and 310, § 5; Larkin *vs.* Mann, 2 Paige, 28.)

It is not requisite to aver that the complainant is in possession of the premises, as that will be assumed upon the allegation of the parties being seised in common. (Jenkins *vs.* Van Schaack, 3 Paige, 245, and cases.)

The possession of a tenant for years is the possession of the owners, so as to warrant the filing of a bill. (Woodworth *vs.* Campbell, 5 Paige, 518.)

If the ancestor died seised and in possession, and there is no allegation of an adverse possession, the presumption will be that the possession follows the seisin of his descendants who appear entitled, and one of them can sustain the action. (Beebe *vs.* Griffing, 14 N. Y. Rep., 235.)

The complaint should set forth the rights and interests of the defendants as between themselves. If the share of any party is uncertain or contingent, or the ownership of the inheritance in any part of the premises depends upon an executory devise, or the remainder is contingent, so that the parties who may be ultimately entitled can not be named, the complainant should set forth the nature of such contingent interests. (Van Cortlandt *vs.* Beekman, June 20, 1837, before Chancellor Walworth.)

The liens and incumbrances upon the premises, as far as the same are known should be stated. (Former Rule 147.)

It is not necessary to make creditors by mortgage, judgment, or otherwise, who have liens upon the property, parties in the first instance. (2 R. S., 318, § 8; Laws of 1830, p. 396.)

The 45th section of the Act of 1830 provides, that no creditor having a specific lien on an undivided share shall be affected by the sale or conveyance unless he shall have been made a party to the proceedings. It seems that such must be the rule with respect to creditors by specific lien on the whole premises.

As to general creditors by judgment, etc., upon undivided shares, if the property is to be sold, the advertisement under the 43d section (Laws 1830, p. 397) when made, is equivalent to their being made parties; and if a partition is made, the lien will attach upon the divided share.

## SECTION V.

### *Proceedings in the Action.*

If the rights and interests of the respective parties were truly stated it was sufficient for the defendants to

answer generally admitting them to be so; but the answer must admit or contest the rights of the defendants as set forth, as well as those of the plaintiff. (Van Cortlandt *vs.* Beekman, 26th June, 1837, before Chancellor Walworth.) But, under section 268, a formal admission is not essential. What is not controverted is admitted.

It was held by Chancellor Walworth, that a defendant might in his answer set up a claim of an equitable title to the whole of the premises, and if he sought a decree for a conveyance of the legal title, he could file a cross bill. (Gorman *vs.* Machin, MSS.)

If the case is ready for a judgment on the pleadings, without there being any infants, absentees, or unknown persons, the cause is brought on for judgment at Special Term, on the usual notice and on the pleadings.

The case may be one in which all the interests are represented by adult parties, and all the interests as claimed are admitted, and cover the whole ostensible title to the property. In such a case the decree will declare the rights of the parties, and if it is uncontested and plain that a partition can be made, commissioners to make partition may be at once appointed.

But if a default is had as to all or some of the defendants, proof of title must be made. This the Statute requires. (2 R. S., 323, § 23.) It could be done before a Master formerly. (Hannan *vs.* Osborn. 4 Paige, 336; Rule 17; Laws of 1830, p. 398.)

In Porter *vs.* Lee (6 Howard, 491) the action was by summons and complaint. Lee was of age, a resident, and the sole defendant. He appeared, but did not answer. If judgment was taken by default there must still be a reference to take proof of title, etc.

In Ripple *vs.* Gilborn (8 Howard, 456) it was held

that the wife of the plaintiff ought to be joined as a party with her husband. The defect not appearing on the complaint, must be set up in an answer. She was a necessary party under the Revised Statute. Jackson *vs.* Edwards was approved, and that case led to the Act of 1840. If the defendants omit to answer, the plaintiff must exhibit his title and abstract of conveyance, as required by the Revised Statutes. This provision remained in force.

If an issue is raised as to title, the former course was to take the proofs in the Examiner's office, or to direct an issue. (Larkin *vs.* Mann, 2 Paige, 28; see also 4 Paige, 336.) We apprehend that the Court may try the question itself, direct an issue, or a reference under section 271.

There have been instances in which, after a decree for actual partition has been made, an inquiry before a Master has been necessary. If one of the parties has been in possession, or received the rents, an account will be decreed, or he will be charged with an occupation rent. (Lorimer *vs.* Lorimer, 5 Mad. Rep., 363; Hyde *vs.* Hindley, 2 Coxe's Cases, 408; Turner *vs.* Morgan, 8 Vesey, 145.) In our own Court, Hoffman *vs.* Ogden, Chaucery Aug. Term, 1835; Bogart *vs.* Bogart, Dec. 8, 1822.

In Arthur *vs.* Arthur, Feb. 1822, the inquiry was directed to be made by the Commissioners.

The order in Hoffman *vs.* Ogden will be found in Hoffman's Ch. Pr., Vol. 3, Number 388. The report of the Master was to be delivered to the commissioners.

The party in possession will be allowed his expenses and beneficial improvements. Thus in Swan *vs.* Swan (8 Price's Rep. 443), the defendant in a suit for partition stated, that he had been several years in posses-

sion, and had laid out various sums in buildings and other improvements, and claimed a lien to be paid a moiety of the amount before partition, or else that it should be allowed to him in the measure of his allotment. *Per curiam.* "Although, in point of fact, the defendant may not have any lien on the premises, yet if he has been at expenses in improving them, the plaintiff has clearly no right to take advantage of that expenditure without making any allowance, and therefore the Court will not interfere, except on these terms."

By the 79th Rule, when the rights and interests of the several parties, as stated in the complaint, are not denied or controverted, if any of the defendants are infants, or absentees, or unknown, the plaintiff, on an affidavit of the fact, and notice to such of the parties as have appeared, may apply at a special term for an order of reference, to take proof of the plaintiff's title and interest in the premises, and of the several matters set forth in the bill or petition, and to ascertain and report the rights and interests of the several parties in the premises, and an abstract of the conveyances by which the same are held.

This is nearly identical with the 177th Rule of the Court of Chancery.

By the 80th Rule, when the whole premises are so circumstanced that a partition thereof cannot be made without great prejudice to the owners, due regard being had to the power of the Court to decree compensation for equality of partition, and to the ability of the respective parties to pay a reasonable compensation to produce such equality—or when any lot or separate parcel of the premises which will exceed in value the share to which either of the tenants in common may be entitled is so circumstanced—the plaintiff, upon sta-

ting the fact in the affidavit, which is to be filed for the purpose of obtaining an order of reference under the next preceding rule, may have a further provision inserted in such order of reference, directing the officer or person to whom it is referred, to inquire and report, whether the whole premises, or any lot or separate parcel thereof, are so circumstanced that an actual partition thereof cannot be made, and that if he arrive at the conclusion that a sale of the whole premises or of any lot or separate parcel thereof will be necessary, that he specify the same in his report, together with the reasons which render a sale necessary.

"And in such case, that he also ascertain and report, whether any creditor not a party to the suit, has a specific lien by mortgage, devise or otherwise, upon the undivided share or interest of any of the parties, in that portion of the premises which it is necessary to sell; and if he finds that there is no such specific lien in favor of any person not a party to the suit, that he further inquire and report whether the undivided share or interest of any of the parties in the premises is subject to any general lien or incumbrance by judgment or decree.

"And that he ascertain and report the amount due to any party to the suit, who has any general or specific lien on the premises to be sold or any part thereof; and the amount due to any creditor not a party, who has a general lien on any undivided share or interest therein, by judgment or decree, and who shall appear and establish his claim on such reference.

"He shall also, if requested by the parties who appear before him on such reference, ascertain and report the amount due to any creditor not a party to the suit, which is either a general or specific lien or incumbrance upon all the shares or interest of the parties

in the premises to be sold, and which would remain as an incumbrance thereon in the hands of the purchaser, to the end that such direction may be given in relation to the same in the decree for the sale of the premises, as shall be most beneficial to all the parties interested in the proceeds thereof on such sale."

These two Rules, the 78th and 79th, are nearly transcripts of Rules 177 and 178 of the Court of Chancery.

For the form of an affidavit and order, see Appendix, Nos. 57 and 58.

## SECTION VI.

### *Reference as to Title.*

The first branch of the inquiries sent to a referee, under the 78th Rule, is to take proof of the plaintiff's title and interest in the premises, to ascertain the truth of the several matters set forth in the complaint, and the rights and interests of the general parties in the premises.

For this purpose, the referee should require the plaintiff to produce an abstract, and trace back his title as tenant in common to the common source and title of all the tenants in common therein; and in his report should, as far as practicable, give an abstract of the conveyances from that time, of the several undivided shares and interests of the parties. (Hamilton *vs.* Morris, in Chancery, Sept. 6th, 1837.)

The next important subject of inquiry is whether a sale is not necessary, or in the words of the Statutes, whether the premises are so situated that an actual partition cannot be made?

In Clason *vs.* Clason, 9 Paige's Rep., 541, the Chancellor said, that the question to be decided was, whether the whole property taken together will be greatly in-

jured or diminished in value if separated into several parts, in the hands of different persons, according to their interests in the whole? In other words, whether the aggregate value of the several parcels into which the whole premises must be divided, will, when distributed among the different parties in severalty, be materially less than the value of the same property if owned by one person.

In judging as to a sale, the referee should not be influenced by the fact, that it would be for the benefit of an infant to have his share of the estate converted into money, instead of remaining in land producing a less income. This could be done afterwards under the general law for sale of infant's estates, when he will not run the risk of having his interests sacrificed for want of funds to compete with the adult tenants in common. *(Ibid.)*

SECTION VII.

*Liens.*

By the 42d section of the Statutes as amended in 1830, where creditors having specific liens shall not have been made parties, the Court, on the motion of either party, shall amend and bring them in, "And shall direct the Clerk of the Court to ascertain and report whether the shares or interests in the premises of the parties in such suit, or any of them are subject to any general lien or incumbrance, by judgment or decree."

Section 44 prescribes the mode of advertising for such liens, by the clerk in the State paper and in a paper printed in every county where the lands are situated.

In Gardiner *vs.* Luke (12 Wendell, 269), it was held, that it was not necessary to have this inquiry

made before ordering a sale. It was only to be directed when moved for by either party.

Hall *vs.* Partridge (10 Howard's Pr. Rep., 188) decided the same point. "If there were no such liens, the expense and delay would be avoided; if there were such, the purchaser would discover them and could have them discharged.

In Noble *vs.* Cromwell (26 Barbour, 475, Court of Appeals, 3 N. Y. Decisions, 382), supported these views.

But if the advertisement is omitted, the parties should produce regular searches for judgments and decrees for twenty years at least.

In the case of Halsted *vs.* Halsted (55 N. Y. R., 442) there was an order of reference under rules 79 and 80. By a clause of the order, if the referee found a sale necessary, he was to report the amount due to any party to the action who had a general or specific lien upon the premises, or any part thereof.

The referee decided that a sale was necessary. The plaintiff had a mortgage upon the undivided share of one of the tenants in common. The assignee of that party contested the mortgage. The referee took testimony upon the matter, and found the mortgage to be fraudulent and void.

The plaintiff excepted upon the coming in of the report and application for judgment. The exceptions were overruled and the report confirmed. A judgment for a sale was ordered, and for distribution according to the report. The General Term affirmed such judgment. On appeal, it was held that the referee had a right to enter upon the inquiry as to the validity of the mortgage; that the inquiry as to the existence and amount of the lien involved the question as to its legality.

SECTION VIII.

*Proceedings and Report.*

The referee, under the general order, is also to inquire as to any specific lien upon the share of any party to the action. He should direct searches to be made of the records as upon the examination of a title. If creditors with such liens are ascertained, they should be summoned before him to get a statement of their demands.

The proceedings before him are the same as upon other interlocutory references. The suggestion before made, as to giving notice of the report being prepared, and hearing objections, is particularly important in these cases, very often involving nice and complicated questions.

If the referee distinctly states in the report that he had caused the necessary searches to be made, and sets forth the incumbrances, he need not annex the searches to his report. (Noble *vs.* Cromwell, 26 Barbour, 475.)

For the Form of a Report, see Appendix No. 59.

It is filed under the 39th rule, and becomes absolute, unless excepted to. After it has become confirmed, from there being no exceptions, or by exceptions overruled, the Court is to be applied to for judgment.

SECTION IX.

*Judgment for Sale.*

By the 85th section of the Act, the Court of Chancery was authorized to decree a sale, when it should appear from the report of a Master or otherwise, that the premises, or any part of them, are so circumstanced that a partition can not be made without great prejudice to the owners. (2 R. S., 330.)

There may be a sale of part of the lands, and an

actual partition of other parcels. The Court is not compelled to sell the whole or divide the whole. (Haywood *vs.* Judson, 4 Barb., Sup. Ct. Rep., 228.)

For the Form of a Judgment of Sale, see Appendix No. 60.

## SECTION X.

### *Sale of Premises.*

The 287th section of the Code, as amended, provides "that real property adjudged to be sold must be sold in the county where it lies, by the sheriff of the county or by a referee appointed for that purpose by the Court; and thereupon the sheriff or referee must execute a conveyance to the purchaser, which conveyance shall be effectual to pass the rights and interest of the parties adjudged to be sold."

This provision is found under the chapter 1, headed, "The Execution," and under Title IX., headed, "Of the execution of the judgment in civil actions."

The 83d section of the Statute as to partition had directed a sale to be made by one of the Masters (p. 254). The constitution of 1846 having abolished that office, the judiciary act of 1847 provided, that any matter before referred to a clerk, master, or referee, might be referred to a clerk, etc., or other suitable person or persons, with the same power as heretofore possessed by such officer or person."

The act of 1869, chapter 509, § 1, which enacted that all sales in the city of New York of property adjudged to be sold by a Court should be made by a sheriff, expressly excepted sales in partition. That part of the act giving the exclusive right to sheriffs has been declared unconstitutional. (Gaskin *vs.* Meek, 7 Abbott, N. S., 142; 42 N. Y. Rep., 186.)

*Hours of Sale.*

By the 74th rule, where lands in the city of New York are sold under a decree, order, or judgment of any Court, they shall be sold at public auction between twelve o'clock at noon and three in the afternoon, unless otherwise specially directed.

The words "at the Merchants' Exchange," formerly in the rule, are omitted.

*Notice.*

By the same rule, "the notice of the sale of lands lying in any of the cities of this State in which a daily paper is printed, except where a different notice is required by law, or by the order of the Court, shall be published in one or more of the daily papers of that city for three weeks immediately previous to the time of sale, at least twice in each week. When lands in any other part of the State are directed to be sold at auction, notice of the same shall be given for the same time and in the same manner as is required by law on sales of real estate by sheriffs on execution."

But in Romaine *vs.* McMillan (5 Howard's Pr. Rep., 318) Justice Edmonds held, that the provisions of the Revised Statutes regulated the notice and advertisement of sales in partition cases. The rule of the Court was inapplicable, as the statute had expressly directed the time and manner of notice. The rule was meant for cases not thus provided for, such as foreclosure sales, and sales of infants' or lunatics' lands.

The Revised Statute directed that the notice of sale by the Master should be the same as before directed in sales by commissioners. By the 57th section of the act, the commissioners were to give notice of sale for the same time and in the same manner as is required

by law for sales of real estate by the sheriff on execution.

The provisions of law as to such sales are as follows. (2 R. S., 369, § 34.)

The time of holding the sale shall be publicly advertised previously, for six weeks successively, as follows:

A written or printed notice thereof shall be fastened up in three public places in the town in which such real estate shall be sold; and if such sale be in a town different from that in which the premises to be sold are situated, then notice shall also be fastened up in three public places of the town in which the premises are situated.

A copy of such notice shall be printed once in each week in a newspaper of such county, if there be one.

If there be no newspaper printed in such county, and the premises to be sold are not occupied by any person against whom the execution is issued, or by some person holding the same as tenant or purchaser under such person, then such notice shall be published in the State paper once in each week.

We presume that this last clause is not applicable to sales in partition.

"In every such notice, the real estate to be sold shall be described with common certainty by setting forth the name of the township or tract, and the number of the lot if there be any, and if there be none, by some other appropriate description." (Section 35.)

By the 75th rule of the Supreme Court, where mortgaged premises or other real estate directed to be sold consists of several distinct lots or parcels which can be sold separately without diminishing the value thereof on such sale, it shall be the duty of the sheriff, or other person conducting such sale, to sell the same in separate

lots or parcels, unless otherwise specially directed by the Court. But if the sheriff or other person is satisfied that the property will produce a greater sum if sold together, than it will in separate lots or parcels, he may sell it together, unless otherwise directed in the order of sale.

*Terms of Sale.*—See the form of the terms of sale in Mortgages Cases, Appendix No. 50.

*Report of Sale.*—See Appendix, No. 61.

*Deed.*

"Upon the Master's report being confirmed he shall give conveyances to the purchasers at such sales, which shall have the same effect as if executed by commissioners according to the foregoing provisions." 2 R. S. § 356, Edm. Edit.

By section 62, such conveyances shall be recorded in the county where the premises are situated, and shall have been a bar, both in law and equity, against all persons interested in such premises in any way who shall have been named as parties in the said proceedings, and against all such persons and parties as were unknown if notice shall have been given of the application for partition by such publication as is hereinbefore directed, and against all other persons claiming from such parties or either of them.

And by section 63, such conveyances shall also be a bar against all persons having general liens or incumbrances, by judgment or decree, on any undivided share or interest in the premises sold, in all cases where the notice to such creditors, hereinbefore prescribed, shall have been given; and also against all persons having specific liens on any undivided share or interest therein who shall have been made parties to

the proceedings. But no creditor having any such specific lien shall be affected by such sale or conveyance unless he shall have been made party to the proceedings.

In Dunham *vs.* Menard (4 Paige's Rep., 442) notice had been given to creditors having general liens upon the undivided interest of one of the parties in a partition suit, to come in and prove their claims. A sale took place, and it was held this divested the lien on the land and left it upon the share of the purchase money.

If the referee determines against the claim the remedy is by an exception.

For form of a referee's Deed, see Appendix, No. 62.

*Fees.*

The act of May 4, 1869 (chap. 509, § 1), which directed that sales in the city of New York of property adjudged to be sold by a Court, should be made by the sheriff, expressly excepted sales in partition. That part of the act which limited the right to sheriffs has been held to be unconstitutional. (Gaskin *vs.* Meek, 42 N. Y. Rep. 186.) It was a local act, which must be confined to its subject, and that expressed in the title.

That title is "An act in relation to the fees of the sheriff of the City and County of New York, and the fees of referees in sales in partition cases." By the fourth section the fees of referees in partition cases were to be the same as were allowed to sheriffs by section 2, and in addition thereto a commission on all moneys received and paid, as allowed to executors, not to exceed, however, five hundred dollars.

I have not found it actually decided whether the act is, in this particular, in force or not. I should judge

from the case of Gaskin *vs.* Meek (42 N. Y. Rep., 186) that sections 2 and 4 are valid provisions.

*Purchasers.*

A purchaser at a partition sale who during the suit had taken a conveyance of an interest in the land, stated to be subject to the proceedings pending, cannot refuse to take the title under his bid, on the ground that he was not a party.

Nor could he take an objection that the pleadings did not correctly state the interests of the parties, nor that the referee did not annex searches to his report. This was now unnecessary.

Nor was it an objection that he did not advertise for liens, if he certified that none existed. (Noble *vs.* Cromwell, 3 N. Y. Court of Appeals Decisions, p. 382.)

Neither the *referee* nor any person for his benefit, shall be interested in the purchase, nor directly nor indirectly purchase any of the premises so sold. (2 R. S., 126, § 58.)

No guardian of an infant party in such suit shall purchase or be interested in the purchase of any lands being the subject of such suit, except for the benefit or in behalf of such infants; and all sales contrary to the provisions of this section shall be void. *(Ibid.)*

In Hannan *vs.* Osborn, Chancellor Walworth decided, that the guardian was warranted in making a purchase to save the property from being sacrificed, or to obtain an advantage for the infant. That he should distinctly announce that he bid for the benefit of the infant and in his behalf, when the property is struck down to him, and should see that the minute of sale of the Master or auctioneer is to that effect. That the report of sale should state such purchase and

be accompanied with an affidavit of the guardian, showing why he deemed the purchase beneficial to the infant. If the Court thought his judgment right, it would ratify the purchase, and then the deed should be executed to the infant, with a power of sale to the guardian, under the Statute as to Powers.

In this case the purchase by the guardian was confirmed. Subsequently the property was sold at an advance and the counsel of the purchaser requiring it, proceedings were taken under the Statute as to the sale of infants' estates. Thus a satisfactory title was made, the guardian uniting in the deed. The order provided for his reimbursement of advances for the shares of the other tenants in common. (Hoffman Chan. Pr. vol. iii., p. 321.)

*Interests of Married Women.*

By an act passed April 28, 1840 (Laws, Chap. 177), it was provided, that in all cases of sales under judgment or decree in partition, where it shall appear that any married woman has an inchoate right of dower in any of the lands divided or sold, or that any person has any vested or contingent future right or estate in such lands, it shall be the duty of the Court under whose judgment or decree such sale is made, to ascertain and settle the proportional value of such inchoate, contingent, or vested right or estate, according to the principles of law applicable to annuities and survivorships, and to direct such proportion of the proceeds of the sale to be invested, secured, or paid over in such manner as shall be judged best to secure and protect the rights and interests of the parties.

Any married woman may release such right, interest, or estate, to her husband, and acknowledge the same before the Master, or one of the Commissioners,

making the sale, separate and apart from her husband in the manner required by law in respect to the acknowledgment of deeds by married women. Upon such release, the share of the proceeds of the sale arising from her contingent interest shall be paid to her husband.

Such release, and also the payment, investment, or otherwise securing any share of the proceeds of a sale according to the first section of this act, shall be a bar both in law and equity against any such right, estate, or claim.

Before the passing of this act the Chancellor, in Jackson *vs.* Edwards (7 Paige's Rep., 408), decided, that a married woman, even if an infant, would be bound by the decree, and he pointed out the mode of protecting her interests upon the same principles as are embodied in this Statute.

In the Appendix, No. 63, will be found clauses adaptable to the different cases where a married woman is concerned.

# CHAPTER IX.

## CLAIMS OF CREDITORS UPON EXECUTORS.

The Code in clause 2 of section 317 adverts to references of this nature by providing, that whenever any claim against a deceased person shall be referred pursuant to the provisions of the Revised Statutes, the prevailing party shall be entitled to recover the fees of referees and witnesses, and other necessary disbursements, to be taxed according to law.

The Statute referred to is found in 2 R. S., 88, Edmonds' Ed. 91, § 36, etc., as amended in 1859 by the act of April 12th, Chap. 261. The latter permits a reference to a sole referee approved of by the surrogate. The order must be entered with the clerk of the Supreme Court.

The 36th section as amended in 1859 is as follows: If the executor or administrator doubt the justice of any claim so presented, he may enter into an agreement in writing with the claimant, to refer the matter to three disinterested persons, or to one, to be approved by the surrogate, and on filing such agreement in the Supreme Court clerk's office in the county in which the parties or either of them reside, a rule shall be entered by the clerk, either in vacation or term, referring the matter to the persons or person so selected.

It was well settled before the Code that the surrogate had concurrent jurisdiction with the Court of Chancery to call executors to account. The pendency of a bill by the creditor in the latter court formed a bar to proceedings, and a decree for the benefit of all interested was also a bar. (Rogers *vs.* King, 8 Paige, 210.)

In Woodruff *vs.* Woodruff (17 Abbott, 165) the administrator was a surviving member of a firm with the

deceased. He was held liable to account for the interest of the deceased in the assets of such firm. An order was made for production of the books.

In Buchlin *vs.* Chapin (35 Howard, 155) the order of the surrogate recited the presentation of the claim and agreement to the reference, signed by the attorneys respectively. The referees were named in the order. The order was then filed with the clerk of the Supreme Court of the county. This was held sufficient as an agreement under the Statute, and of the surrogate's approval of the referees.

All demands, whether of a legal or equitable nature may be referred—all claims which an executor is competent to settle and adjust. This rule was declared in Francisco *vs.* Fitch (25 Barbour's Rep., 130); Russell *vs.* Lane (*Ibid*, 519); and in Brechelt *vs.* Bush (18 Abbott, 337) these decisions were affirmed, after examination of cases appearing to conflict, especially Akerly *vs.* Akerly (17 Howard, 21).

In White *vs.* Story (28 Howard, 173) it was repeated that all legal and equitable claims could be referred. A claim to charge the separate estate of a married woman could be.

For the Form of a Consent and Order, see Appendix, Nos. 64 and 65.

By the 37th section of the Statute, the referees shall proceed to hear and determine the matter, and make their report thereon to the Court in which the rule for their appointment shall have been entered. The same proceedings shall be had in all respects, the referees shall have the same powers, be entitled to the same compensation, and subject to the same control as if the reference had been made in an action in which such Court might by law direct a reference.

And the Court may set aside the report of the ref-

erees, or appoint others in their places, and may confirm such report, and adjudge costs as in actions against executors; and the judgment of the Court thereupon shall be valid and effectual in all respects, as if the same had been rendered in a suit commenced by the ordinary process.

The proceedings before referees appointed in actions are stated in sections 43 to 49 of the Statutes. (2 R. S., 384, Edmonds' Ed., p. 401.)

In the case of Tracy *vs.* Suydam (30 Barbour's Rep., 110) the practice in several material particulars is defined.

The agreement to refer the claim need not notice any matter of defence raised against it.

Upon the approval of the surrogate of the agreement to refer, and filing the same in the office of the clerk of the Supreme Court, the agreement becomes operative as a voluntary appearance of the parties in the Court, and a submission to its jurisdiction for the purpose of adjudicating upon the claim. The account presented is in effect the plaintiff's complaint, and there being no pleadings and no provision in the Statute for pleadings, the defendant is limited to no particular defense, and consequently every legal defense to the claim is available.

On the trial, the plaintiff must prove his claim, and satisfy the referee of its justice and validity; and every species of legal proof tending to defeat the claim as a whole or in degree, or amount, is admissible.

A set-off may be made and the executors can make any defense that the testator could have taken if living, and the same were properly pleaded in an action upon such claim.

Judgment upon the report is to be applied for at special term. It is irregular to enter it without an ap-

plication to the Court. (Bradley *vs.* Fisher, 24 Howard, 404.)

The course is for the successful party to file the report, give notice of such filing, and of a motion for judgment upon it.

In Coe *vs.* Coe (37 Barbour's Rep., 232) the Court state the practice as follows:

"It seems there are only two ways in which the report of a referee can be reviewed upon a reference to settle claims made against executors and administrators. One is by an appeal to the general term directly from the judgment on the report of the referee and upon a case, or a case and exceptions, making a part of the record. The other is by a motion for a new trial at the special term, by way of opposing the motion to confirm the report.

"A judgment given at a special term upon a motion made to confirm the report of the referee in such a case, setting the report aside, and directing the payment of costs by the claimant, is erroneous and unauthorized by law.

"A judgment under the Statute when given must be upon the report of the referee confirmed by the Court. The Court can not upon setting aside the report entirely displace the referee, by itself pronouncing the judgment which the referee should have given"

*Costs.*

If the decision is in favor of the executor or administrator he is entitled to costs as against the claimant, as in an action under the Code. (Bradley *vs.* Fisher, *ut supra.*) The amount is such as is given by the Code in an action between party and party. *(Ibid.)*

In Smith *vs.* Patten (9 Abb., N. S., 207) the cases

of Sands *vs.* Croft (10 Abbott, 216) and of Gooding *vs.* Palmer (17 Abbott, 374) were cited, and the rule recognized, that the claims which may be referred under the Statute, with the approval of the surrogate, are those that arise out of something done, commenced, or omitted in the lifetime of the deceased person, whom the disputing executor represents. They are only such as accrued during the lifetime of the deceased, or would have accrued against him if he had lived. (See Form of a Report, Appendix, No. 66.)

# CHAPTER X.

## ACTION BY ONE ON BEHALF OF HIMSELF AND OTHERS.

§ 1. Section 119 of the Code—Cases.
§ 2. Who to attend on Reference.
§ 3. Advertisements.
§ 4. Claim of a Creditor.
§ 5. Account of Defendant.
§ 6. Report.

### SECTION I.

### *Section* 119 *of the Code—Cases.*

The 119th section of the Code provides, that when the question is one of a common or general interest of many persons, or when the parties are very numerous and it may be impracticable to bring them all before the Court, one or more may sue or defend for the benefit of the whole.

This provision comprises what in England, and formerly with us, was known as a creditor's bill and a bill for the administration of assets, by legatees or others having an interest in funds distributable. The principle applied also to a bill by an executor or one in a fiduciary situation, seeking to account for, and distribute funds in his hands among many entitled.

Such actions have been sustained since the Code in the following cases: Wood *vs.* Draper, 4 Abbott, 322; Bouton *vs.* City of Brooklyn, 15 Barbour, 375; Towner *vs.* Tooley, 38 Barbour, 598; and see Smith *vs.* Lockwood, 13 Barbour, 218.

In Towner *vs.* Tooley, preferred creditors in an assignment sued on behalf of themselves and the other creditors for an accounting and closing of the trust, by

selling the assets and distributing the proceeds. The creditors were very numerous.

In Duffy *vs.* Duncan (35 N. Y. R., 187), one of the creditors named in an assignment brought an action on behalf of himself and all others who should come in and contribute to the costs of the action, against the assignee for an account and distribution.

The action was sent to a referee to hear and determine, with a provision that in case he found the defendant liable to account, he should make publication requiring the creditors to come in and prove their claims, on contributing, etc. The referee reported that he had decided that the defendant was bound to account; that he had made publication, requiring the creditors to prove their claims, etc. That he had taken proof of various claims which were presented, and had stated the accounts. He found a certain sum due, which he divided among the several creditors according to their priorities, awarding costs and allowances to the plaintiffs and defendants, and costs to those creditors whose claims were allowed.

Judgment was entered and affirmed at the General Term, and by the Court of Appeals.

In Green *vs.* Breck (10 Abbott, 42) it was held that one creditor could not bring an action to set aside an assignment made contrary to the statute as to limited partnerships. He must sue for the benefit of himself and the other creditors.

For the Form of an Order of Reference in such a case, see Appendix, Nos. 67 and 68.

## SECTION II.

### *Who to attend on the Reference.*

The parties who have appeared in the action have a right to appear, and should receive notice to attend.

Creditors specified by name, and not parties, should receive actual notice, and any creditor who comes in and prefers a claim, becomes, as it is termed, a *quasi* party to the suit, and is entitled to notice of all the proceedings. (Hoffman's Ch. Pr., vol. I., p. 520.) Even where a bill has been taken as confessed, there are several cases in which the party is entitled to notice. (Hart *vs.* Small, 4 Paige, 551.) A party who admits all the allegations of the complaint may have an interest in the inquiries resulting from them.

### SECTION III.

### *Advertisements.*

In Thompson *vs.* Brown (4 John. Ch. Rep., 619) the Master was directed to cause reasonable notice to be given to creditors, in his discretion either personally, or by advertisement inserted in such public paper or papers as he should deem proper, for them to come in.

By the Revised Statutes (2 R. S., 183, § 112) whenever a bill shall be filed in any Court of Equity for relief for the benefit of the creditors generally, of any person or of any estate, or for the benefit of any other persons than the complainants who will come in and contribute to the expenses of such suit, every order which may be made thereon, requiring such creditors or other persons to exhibit their demands, shall, in all cases, be published once in each week for at least three weeks, and as much longer as the Court may direct, in the State paper, and in a newspaper printed in the county where such demands are to be exhibited.

In Duffy *vs.* Duncan, before cited, the referee was directed to advertise for the creditors to come in and prove their claims.

In two cases before the writer as referee, one of a

reference to take the account of an executor, and the other of an assignee, an advertisement was inserted in the State paper and in a paper published in the county where the testator died and his will was proven, or where the assignment was made.

The English practice of having two advertisements, one general without naming a day, and the other fixing a day peremptorily, has not prevailed with us. One advertisement alone is used. (See the Form, Appendix, No. 69.)

SECTION IV.

*Claim of Creditor.*

A creditor coming in presents a charge or claim, stating the nature of the debt, the security, if any, the amount, with an affidavit verifying it as actually due; that there are no payments or credits upon it other than what is stated, and no security, or what security.

"The affidavit," says Lord Eldon, "is not to be attended to if the debt is contested. It is only an assurance that the debt has not been paid in cases where it may have been, and the claimant only knows it." (Fondate *vs.* Nash, 19 Vesey, 197.)

Upon its being laid before the referee, he should appoint a day to proceed upon it, of which day the attorneys of the parties who have appeared must have notice. We consider the summons of the referee is the most proper mode of notice.

If there is a contest, witnesses may be examined. And here, also, we conclude that the Code governs as to the examination of parties, whether at the instance of another party or on his own behalf. Creditors coming in are treated as parties. (16 Vesey, 239; 3d Atkyns, 557.) Such a one may apply to rehear the cause. (Gifford *vs.* Hart, 1 Sch. & Lefroy, 409.)

The Court has taken the conduct of the reference from the plaintiff and vested in a creditor. (2 Mad. Rep., 183 ; 3 Merivale, 433.)

By an order of Lord Hardwick (Beames Orders, 375), in cases where distinct demands of several parties or creditors are comprised in one report, any person is to be at liberty to take a copy of so much of the report or schedule as relates to any specific demand.

If, upon investigation, the claim is disallowed, the practice has sometimes been pursued for the claimant to file with the Master (referee) an objection. Then upon the general report being prepared and no change made in the decision, to renew the objection, as the ground for an exception.

In a case in which the Master declined to examine a claim because he deemed it was not of a nature admissible under the decree, a separate report was made stating the claim and his decision. On this, an application was made to the Court for its direction, and an order was made for him to admit and examine into the claim. (Paynter *vs.* Houston, 3 Merivale, 297.)

By the 108th rule of the Court of Chancery, the creditor could take a separate report as to his claim, with the evidence relating to it, and apply by petition for an order that it be admitted. The 70th and 71st rule of the English orders of 1828 are similar. (See Hoffman's Masters in Chancery, 64; 2 Br. Ch. Rep., 851.)

In England it appears to be the general rule that the creditor proves his demand at his own expense. (Abel *vs.* Screech, 10 Vesey, 356.)

But in Mason *vs.* Codwise and others, June Term, 1822, the subject was brought before the Chancellor, who observed "that if a creditor comes in and proves his debt before the Master under the general rule, he

comes in under the condition of contributing to the costs of the suit; and if he proves his debt and creates on his part no unreasonable expense, he ought to have his costs borne by the fund; and when he comes in subsequently, and not upon the usual terms, he ought to bear his own expense, unless it be much enhanced by an unreasonable opposition to it."

A creditor may be allowed to come in and prove his claim before the referee at any time before the report is signed, although the time has expired.

In Wilder *vs.* Keeler (3 Paige, 164) it was held, that it was a matter of course to allow a creditor to prove his demand before the fund is actually distributed, upon his showing a sufficient excuse and payment of costs caused by the delay. Notice must be given to the solicitors of such as have appeared. After the report is filed, a claimant may still be admitted on terms. (Pratt *vs.* Rathbun, 7 Paige, 271.)

If the plaintiff in the action unreasonably delays the prosecution of the suit, the Court will commit the conduct of it to another creditor or party. (8 Vesey, 520; 2 Mad. R., 183; Sims *vs.* Ridge, 3 Merivale, 458.)

In these actions a creditor will be enjoined from proceeding at law, after the decree for an account and to bring in creditors. (Thompson *vs.* Brown, 4 John. C. R., 619; Perry *vs.* Phillips, 10 Vesey, 34.) It appears, from the case of Jackson *vs.* Leaf (1 Jacob & Walker, 229), that the costs of creditors who have sued at law are allowed out of the fund up to the date of the decree.

## SECTION V.

### *Account of Executors.*

The other material branch of the order of reference is the taking the account of the executors or other

party possessed of the fund. The course of proceeding on such an inquiry is stated *ante*, Title II., chapter i., § 1.

The distribution of the assets which the referee is to make, we presume must be according to the preferences and order of the Revised Statutes. (2 R. S., 87, § 27, 28.)

In Hoffman's Masters in Chancery, p. 187, the rules existing prior to 1830 are fully stated, and Thompson *vs.* Brown (4 John. C. R., 619) commented upon.

### SECTION VI.

### *Report.*

We presume that in cases of this description the reference is not to hear and determine, but for an accounting and distribution sanctioned by the unrepealed practice of the Court of Chancery, and warranted by the language of the second clause of section 271.

Hence, the course should be of giving notice of the report being ready that the parties may make objections, and hence the 39th rule applies. The report is to be filed, and becomes absolute unless exceptions are taken.

For the Form of a Report, see Appendix, Nos. 70 and 71.

# CHAPTER XI.

## *Mechanics' Liens.*

It is of consequence to bear in mind the principle that "Proceedings of this description have no foundation in the Common Law, but rest entirely upon the Statutes." (Benton *vs.* Wickwire, 54 N. Y. Rep., 228.)

Separate statutes have been passed for the enforcement of such liens in the City and County of New York, in the counties of Kings and Queens, Erie, and Onondaga. A general Act of May 4, 1869, made the Act of April 17, 1854, applicable to all the counties of the State, except the five counties above specified, and in 1870 Rensselaer was also excepted.

The provisions of such Statutes, so far as they are within the scope of the present work, are hereafter noticed.

It is of importance that a referee should have a general knowledge of the nature and extent of such liens, in whose favor they are imposed, and the mode of bringing them before the Courts for enforcement. A full exposition of them would be needless and inappropriate. It may be found in Mr. Guernsey's valuable work, "Mechanics' Lien Laws," published in 1873.

### *First.—Liens in the City of New York.*

The Statute of May 5, 1863 ; Laws, 1863, chap. 500, with an Amendment of the 21st of April, 1866, chap. 752 ; of May 2, 1870, chap. 529, and May 13, 1872, chap. 669, regulate the proceedings in the City of New York. The two latter Statutes only extend the law to bridges and trestle work for railroads, and to wharves, piers, bulkheads, and the materials therefor.

The first section of the Act of 1863, as amended in 1866, provides that any person who, as contractor, laborer, workman, merchant, or trader, shall, under any contract with or employment by the owner, or by directions of the owner or his agent, perform any labor or furnish any materials towards the erection of, or in altering, improving, or repairing any building or buildings *(and who shall file a notice thereof)*, under and according to said Act, shall have a lien for the full and fair value of their labor and materials, or either, upon such house or building, and the appurtenances and lot on which the same shall stand, to the extent of all the right, title, and interest which the owner shall have therein at the time of filing the notice of lien required by the sixth section of said Act, and to no greater extent."

The qualifications in this section need not be stated.

The notice referred to in the Statute is found in the sixth section of the Act of 1863, but as amended in 1872 (chap. 669). The time for filing it shall be thirty days from the time when the last work shall have been performed on wharves, piers, bulkheads, and bridges; and ninety days in the case of bridges and trestle work for railroads, under the Act of 1870.

For buildings, etc., under the Act of 1863, the time appears to remain unchanged, viz.: three months after the work is done, or materials furnished.

The clauses which bear upon the mode of proceeding and pleadings are the following:

The second section directs, that all persons having liens, in order to enforce the same, shall prove their demands in the same manner as in ordinary actions or law; but no variance as to the persons named, in any statement of claim, or in any pleading, shall impair

the rights of the claimant, but every party shall have relief according as the rights appear in evidence.

Section 4 provides for the institution of proceedings to foreclose or enforce the liens, and who may take them.

By a clause of this section 4—"Where the aggregate of the liens shall be less than five hundred dollars, the said proceedings may be had before any Court in the said city; and where they exceed that sum when the proceedings are commenced, the action shall be conducted in a Court of Record having equity jurisdiction, and none of the Courts of said city shall be deprived of jurisdiction by reason of the residence of parties elsewhere; and service of process in such action may be by publication as to any of the parties not residing in this State, or who may have removed therefrom."

The fifth section provides that the proceedings shall be commenced by a notice stating the liens and times of filing, to be served upon all persons having filed notices of lien at the place by them designated, and on the owner and incumbrancers when they can be found, requiring them to appear in Court at a day and hour named, and be served ten days before the time specified, except those acquiring after liens, who shall be required to appear summarily, at such time as the Court, or Judge thereof, shall order."

"And within ten days after service each party shall file in Court, or with the Clerk, a brief statement of his claim, and any party interested may in five days state his objections to such claim, and if in a court of Record, copies of these shall be served on the Attorney of any claimant where claim is to be affected by such objections."

"And the issue thus made shall be tried as in ordinary actions."

The Court shall proceed without regard to matters of form, which shall be amendable at all times, while the proceedings progress, without costs. Judgment shall be entered according to the equity and justice of the claims of the respective parties.

And then the seventh section provides as follows:

(1.) "In case the parties notified shall neglect to appear, and object or insist on any claim, the Court may take proofs and determine the equities of the parties."

(2.) "And in such case, or in cases where they appear and plead, the Court may determine the rights of all the parties, and the amounts due to each, and by whom to be paid."

(3.) "And may order any question to be tried by a jury."

(4.) "Or refer the whole matter to a referee to examine and pass upon the rights of the respective parties, and report upon the same in a summary manner, as in the case of claims to surplus moneys in mortgage cases; on which every party shall be at liberty to take proofs for or against any claim or lien."

(5.) "And such judgment or decree shall be made thereon as to the rights and equities of the several parties, among themselves, and as against any owner, as may be just."

An appeal is provided for.

In all these provisions we have no word indicating that the proceeding should be an action under the Code, with its complaint and answer. On the contrary, the fifth section seems to contemplate only a brief statement of the claim and objections to it to be filed. The issue made on these is to be tried as in ordinary actions. The word *pleading* is used in the

second section, and the word *plead* in the seventh. This is all to guide us upon this point.

The cases I have met with are as follows:

In Reynolds *vs.* Hamill (1 Code Rep., N. S., 230) it was held under the lien law of 1851, that the service of the notice prescribed was the commencement of the suit, and the substitute for a summons in an ordinary action.

In Smith *vs.* Haines (*Ibid*), upon the notice given to the parties, the owner and the mechanic appeared before the Court. Justice Daly ruled, that the mechanic should file his complaint within ten days, and the owner should have the usual twenty days to answer. The cause was then to proceed in the same manner as any other action.

This case arose under the act of 1851. By the eighth section thereof, issue shall be joined upon the claims made and the same may be noticed for trial, and shall be governed, tried, and the judgment thereon enforced, in all respects as upon issues joined and judgments rendered in all other civil actions for the recovery of moneys in said Court.

In Knapp *vs.* Brown (11 Abbott, N. S., 118; 45 N. Y. Rep., 207, 1867) a complaint was filed stating the case, and against two defendants. One of them answered, the other offered to allow judgment for a certain sum.

(See also the Form in Guernsey's Mechanics' Liens, p. 188, and Muldoon *v.* Pitt, 54 N. Y. Rep., 269.)

In Schaettler *vs.* Gardiner (41 Howard, 243) the order was that the claimant serve his complaint and bill of particulars within twenty days, and that the defendants serve their answer within twenty days thereafter. The case was referred by consent to hear and determine the same. The referee reported that

the plaintiff had been paid in full and that the defendant G. was entitled to judgment dismissing the complaint.

The plaintiff excepted; the report was confirmed by the Court, and judgment entered accordingly.

The course pursued in Muldoon *vs.* Pitt in the Court of Common Pleas, we presume affords a sure guide for the practice. We observe, that after notice of the lien to the Clerk, notice was given to the owners, etc., to appear in Court on a certain day to abide snch order or judgment as might be made. Then the order was that the claimant serve the attorneys of the defendant with a statement of his claim duly verified within twenty days, and the defendants serve their answers or objections within twenty days thereafter.

The form of the statement or complaint, the answers, order and report, are fouud in the Appendix, No. 72.

The report was filed, exceptions taken and filed, and then the case brought on at Special Term, the exceptions disposed of, and judgment ordered.

Thus clearly the right of a referee as a judicial officer for the cause, was inferentially but strongly disallowed. We may notice that the referee pursued the course of finding facts and conclusions of law, which is convenient and justifiable. We must notice, however, that in Schacttler *vs.* Gardiner (41 Howard, 243) before cited, Justice Daly said that in his view Rule 32 does not apply to a reference "of the issues" in a lien proceeding, and that the exceptions are not to be heard first at Special Term.

In that case the order to hear and determine the issues was by consent.

In Mr. Guernsey's work, page 201, is a precedent taken from a case in Court, as we understand. In this,

although the words of the order are "to hear, try, and determine the same and to report to the Court," and although the referee finds facts and conclusions of law, as under section 271, yet it appears from the judgment that the report was filed and presented to the Court, and judgment entered on an application at the Special Term.

We doubt whether to hear and determine as a Judge, with the powers conferred in section 272 of amendment, etc., could be given to a referee, even by consent, but that the course must be the same as upon a reference as to a surplus in mortgage cases. At any rate, this must be the guide, unless an order is made by consent.

The 77th Rule of the Supreme Court provides as follows: On filing the report of the sale, any party to the suit, or any person who had a lien on the mortgaged premises at the time of the sale, upon filing with the Clerk where the report of sale is filed, a notice stating that he is entitled to such surplus moneys, or some part thereof, and the nature and extent of his claim, may have an order of reference to ascertain and report the amount due to him or to any other person, which is a lien upon such surplus moneys, and to ascertain the priorities of the several liens thereon, to the end that on the coming in and confirmation of the report on such reference, such further order may be made for the distribution of such surplus moneys as may be just.

"Every party who shall have appeared in the cause, or who shall have filed such notice with the Clerk previous to the entry of the order of reference, shall be entitled to service of a notice of the application for a reference, and to attend on such reference, and to the

usual notice of subsequent proceedings relative to such surplus."

The proceeding then before the Referee is to give notice or cause a summons to be served upon the attorneys of all who have appeared and filed liens. He proceeds by adjournment in the usual mode. He hears every one who attends, not merely in support of his own claim, but in contesting that of any other claimant. (See the Mutual Ins. Co. *vs.* Bowen, 47 Barbour, 618, *ante*, chap. vii., § 2.)

The report in cases before cited has been in the form of Findings of Fact and Exceptions of Law, a course no doubt proper, but not prescribed. The Form of an ordinary report upon surplus moneys in nearly all cases would suffice.

In the case of Muldoon *vs.* Pitt, the referee was requested (as it seems at the close of the trial) to make numerous specific findings, most of which he refused, and the party excepted.

And the report is to be filed under the 32d rule, and notice is to be given to all who appeared before the referee. Exceptions may be taken. If none are taken, the Court should be moved for judgment after the eight days have elapsed. If exceptions are taken, the case may be noticed upon them, and for judgment at a Special Term, or by the excepting party, upon the exceptions alone.

There are two points of moment which a referee may be called upon to determine and report. If the lien extends to several houses which have been conveyed at different times to different persons, the sale will be ordered in the inverse order of alienation, the last conveyed to be sold first. (Paine *vs.* Boddy, 4 E. D. Smith, 734.) And if the contracting party retains the title to any parcel, that must be first sold. (*Ibid.*)

A personal judgment may sometimes be also directed.

The provision (§ 9) is, that judgment may be enforced by an execution under which, the property on which the lien is adjudged, may be sold; and personal liabilities may be enforced by execution against the property of any party against whom a personal judgment shall have been rendered. The contractor shall be personally liable to the lienor for the whole amount of his indebtedness, and the owner to the extent of the amount due by him to his contractor.

This means a liability of the party's general property to the judgment, to be enforced against property only.

But such a judgment can not be for a larger sum than is named in the notice of lien, with interest and costs. (Williamson *vs.* Hardwicke, 10 Abbott, 98.)

*Liens in Kings and Queens Counties.*

The action which may be brought to enforce the lien in these counties, is defined in the second and third sections of the act of April 24, 1862. The claimant may enforce or bring to a close such lien by a civil action in a Court of record in the city or county in which such lands or any portion of them may be situated, subject, however, to the following restrictions and limitations. (§ 2).

"The manner and form of instituting and prosecuting any such action to judgment, including the personal service of process therein, shall be the same as in other civil actions in the Court in which the same may be brought, except as herein otherwise provided."

Then follow some specific regulations not pertinent to the present subject.

By the fourth subdivision, the pleadings are to be

the same as required by law in civil actions, and in accordance with the rules and practice of the Court in which the action is brought. "And such action shall be brought to an issue and to trial, put upon the calendar, tried, judgment had and entered, and appeal be taken therefrom, and costs taxed and recovered pursuant to such law, rules, and practice in such civil actions in which the summons is, *as mentioned in subdivision two of this section;* and such action shall be governed and the judgment therein enforced in the same manner as upon issues joined and judgments rendered in all such civil actions aforesaid."

The second subdivision above referred to directs that the summons shall be in the form and manner required by the second subdivision of section 129 of the Code of Procedure. By the fourth section, in case the defendants shall not answer the complaint within the time required, the plaintiff may apply, on proof of service, for a writ of inquiry, and the same may be issued to the sheriff, etc., or the amount of such claim may be assessed by the Court, and judgment may be entered upon the same, etc.

There is no authority here for a reference.

By the eleventh section, where there are other liens on file affecting the premises, notice of the application by the owner for the surplus proceeds of a sale must be given to such claimants, and thereupon the Court shall distribute the surplus proceeds among the parties entitled thereto, according to their respective rights and priorities, and may order a reference to take proof in relation to such rights and priorities."

This clause plainly confers no authority of a judicial nature. It is simply to collect the proofs and return them to the Court. It is similar to the provision in the third subdivision of section 271 of the Code.

The question is, as to the power to order a reference, and the nature of such reference, where the pleadings in the action raise an issue. The language of the fourth clause of section two is very comprehensive.

The cause is to be brought to an issue and to trial, put upon the calendar, tried, and judgment rendered according to the law and rules concerning civil actions in the Court. The Code as to Courts of Record is, we judge, fully adopted and prescribed, except as specially varied.

It results, if this view is correct, that there may be a reference in such a case to hear and determine *by consent* under section 270; but it is not apparent how such a reference can be ordered under section 271, unless the examination of a long account is involved.

But a reference in almost every case would be warranted under subdivision 2, of section 271, where the taking of an account is necessary before judgment. (Sec. 2, Code Reporter, 115, and 13 Abbott, 124; Freeman *vs.* Atlantic Ins. Co.)

The following are the authorities we have found:

In Hart *vs.* Wheeler, 1 N. Y. Supreme Ct. Rep., 403 (Thompson & Cook), a case arising in Brooklyn, notice of the lien was served on the owners and on another as contractor, by one who had done the work. The referee found nothing due from the owner to the contractor, and therefore dismissed the action.

Held error. The amount of the lien was not limited by the debt of the owner to the contractor.

In Moran *vs.* Chase (52 N. Y. Rep., 346), also arising in Brooklyn, it appears that there were pleadings in the case and a reference ordered. The referee, in his report, directed a judgment for a sale of the premises. Such a judgment was entered at Special Term. It ordered in addition a personal judgment

against one of the defendants. This was held not warranted by the report. The proper remedy was a motion to correct the judgment to make it conform to the report.

In Quinn *vs.* Martin (54 N. Y. Rep., 660, 1873), the complaint was in the name of two plaintiffs. The answer admitted the performance of the work, and of extra work. One of the plaintiffs testified before a referee that his co-plaintiff had no interest in the extra work. The referee was requested by the defendant to find this fact. He refused, and his ruling was affirmed, because no issue to this effect was raised on the pleadings. The allegation of the complaint was inconsistent with it. The recovery bound both as far as the defendant was concerned. He could not be injured, and the fact, if such, was immaterial as to him.

By a Statute passed May 4th, 1869, chapter 558, the lien law of April 17th, 1854, was extended to every county of the State, except the five counties of Erie, Kings, Queens, New York and Onondaga, and in 1870 the county of Rensselaer was also excepted.

By the fourteenth section of this act of 1854, it is provided that at any time after the issue shall be so joined in the Supreme Court, or County Court, and at least ten days before the commencement of the Court, the same may be noticed for trial and put upon the calendar of such Court, by either party furnishing the Clerk of the Court with a notice of the issue as now required in other actions; and the action shall thereafter be governed and tried in all respects as upon issues joined and judgments rendered in other actions arising upon money demands upon contracts in said Courts; and the judgment shall thereupon be enforced if for the claimant, as provided by the eleventh section

of this act; and if for the owner, as in other actions arising on contract.

The eleventh section is as follows:

"In case said owner shall not appear as required in and by the notice given in pursuance of the sixth and eighth sections of this act, then on filing with the County Clerk when the action to enforce the claim is brought to the Supreme Court or County Court, or with the justice when the action is before said justice, an affidavit of the service of such notice and bill of particulars and the failure of the owner of the property to appear as therein required, the amount of such claim may be assessed by the said County Clerk or by the Court or Justice, as the case may be, and upon the assessment of damages as aforesaid, judgment shall be entered upon the said assessment, establishing the amount of said lien with the costs, and executions shall thereupon issue for the collection and enforcement of said claims so adjudicated and established in the same manner as executions upon other judgments in said courts, in actions arising on contracts for the recovery of money only, except that the execution shall direct the officer to sell the right, title, and interest which the owner had in the premises at the time of filing the notice prescribed by the first sections of this act."

Under the comprehensive language used in the fourteenth section, we presume a reference to hear and determine may be had by consent; but one by compulsion could only be directed when authorized under section 271, demanding the examination of a long account. In general we apprehend the course of proceedings will be the same as in interlocutory references; and the report be filed and judgment applied for at the Special Term.

## CHAPTER XII.

### TRUSTEES, ETC., OF INSOLVENT DEBTORS, ETC.

#### SECTION I.

By an act of April, 1862 (Edmond's Ed., vol. ii., p. 46), the Revised Statutes were amended in several sections thus: "If any controversy shall arise between the trustees and any other person in the settlement of any demands against such debtor, or of debts due to his estate, the same may be referred to one or more indifferent persons, who may be agreed upon by the trustees and the party with whom such controversy shall exist, by a writing to that effect signed by them. (§ 19.)

"If such referee or referees be not selected by agreement, then the trustees, or the other party to the controversy may serve a notice of their intention to apply to the officer who appointed said trustees, or to any judge of the Supreme Court at Chambers, residing in the same district with the trustees, for the appointment of one or more referees, specifying the time and place when such application will be made; which notice shall be served at least ten days before the time so therein specified. (§ 20.)

"On the day so specified, upon due proof of the service of such notice, the officer before whom the application is made shall proceed to select one or more referees, the same in all respects as they are now selected according to the rules and practice of the Supreme Court. (§ 21.)

"When any witness to such controversy shall reside out of the county where the said trustees resided at the time of their appointment, the referee or referees appointed to hear said controversy shall have power to

issue a commission or commissions, in like manner as Justices of the Peace are now authorized to issue the same, and the testimony so taken shall be returned to said referee or referees in the same manner, and be read before them on a hearing in like manner as testimony taken on commission before Justices of the Peace. (§ 22.)

"The officer before whom they shall be selected shall certify such selection in writing. Such certificate, or the written agreement of the parties, shall be filed by the trustees in the office of a clerk of the Supreme Court, when the trustees were appointed under the first article of this title, and in the said office or in that of the Clerk of the Court of Common Pleas of the county when the trustees were appointed under any other article of this title, and a rule shall thereupon be entered by such Clerk in vacation or in term, appointing the persons so selected to determine the controversy. (§ 23.)

"Such referees shall have the same powers and be subjected to the like duties and obligations, and shall receive the same compensation as referees appointed by the Supreme Court in personal actions pending therein. (§ 24.)

"The report of the referees shall be filed in the same office where the rule for their appointment was entered, and shall be conclusive on the rights of the parties if not set aside by the Court." (§ 25.)

SECTION II.

The language of the nineteenth section in 1830, as to claims of the estate, was the same as at present—*debts due to his estate.* The act of 1813 (1 R. S., p. 161) used the language "any debt or *demand* claimed by the trustees."

In Denny *vs.* the Manhattan Company (2 Hill's Rep., 220) the claim was as to stock in an incorporated company, and after a long examination it was held that this was not comprised in the term "debts." It was not a pecuniary demand resting on contract, express or implied.

The twenty-first section prescribes the selection of the referee in the same manner as now selected by the rules and practice of the Supreme Court. (See as to this *ante,* p. 4 and p. 151.)

The language used in section twenty-three is "To determine the controversy," and by the twenty-fourth section "the referee shall have the same power, etc., as referees appointed by the Supreme Court, in personal actions pending therein."

This language is the same as that in the Statute of 1830, and the rules thus adopted were, we presume, those found in the Revised Statutes as to referees. (2 R. S., 384.)

Whether the effect of the present Statute is to make the rules of the Code as to the powers and duties of a referee applicable, is a question which I have not found discussed in any case. It would seem a just conclusion that very explicit language should be needed to confer upon a referee such extensive judicial power as is conferred by section 272. Hence, even if an absolute consent of all parties could avail, no compulsory reference with such authority could be had. Then the proceedings would be the same as in ordinary interlocutory references. The report must pass upon and settle the right. It is not enough to report the evidence or even to state the facts only. The old case of Hawkins *vs.* Bradford (1 Caine's Rep., 160) is a sufficient authority for this.

It is declared "That the report shall be conclusive

upon the rights of the parties unless set aside by the Court." This can be effected by pursuing the usual practice under the thirty-seventh Rule of filing the report and hearing the same upon exceptions, if any are takeu to it. (See the Forms of Order and Report, Appendix, No. 73.)

## CHAPTER XIII.

### UNDER STATUTES AS TO INSOLVENT MUTUAL INSURANCE COMPANIES.

By an act passed April 21, 1862 (Laws, chapter 412), it was provided as follows:

"If any controversy or disagreement shall arise between the receiver of an insolvent or dissolved mutual insurance company, in the settlement of any demand or claim against any member or stockholder of the company of which he is receiver, or any other person; or if, after personal demand for payment of such demand or claim shall have been made, and the payment of the sum claimed be neglected or refused, the same may be referred to a sole referee, who may be agreed upon by the receiver and the person against whom such demand or claim is made, by a writing to that effect signed by them, or upon application to any justice of the Supreme Court residing in the district where such receiver keeps his office, as herein stated; and all controversies relating to such receiver's business may be referred to one referee in the discretion of the Court; such referee shall be appointed upon ten days' notice to the adverse party. (§ 1.)

"The referee so appointed shall proceed in a summary manner to hear the proofs and allegations of the parties upon written or oral pleadings, and shall have the same powers and be subject to the same duties and obligations, and shall receive the same compensation as referees appointed by the Supreme Court, in personal actions pending therein, and upon his report a judgment may be entered in said Court, and be the judgment of said Court, in the same manner; and the

Supreme Court may, on appeal from said judgment to the General Term, set aside the report of the said referee; but no appeal from such judgment shall suspend or delay the execution thereon, unless there shall be filed with the notice of appeal to the Clerk of the Court, a certificate of a Justice of the Supreme Court, to the effect that there is probable error in the said judgment, nor unless security be given to the satisfaction of said Justice for the payment of said judgment and the costs of the appeal, if said judgment be affirmed. (§ 2.)

"All controversies before said referee shall be brought to a hearing upon notice to the adverse party, the same as now required by the rules and practice of the Supreme Court. (§ 3.)

"The referee so appointed, at any time after his appointment and *without* an issue of fact joined, shall have the same power and authority to issue a commission to examine witnesses relating to any controversy before him as a Justice of the Peace now has. (§ 4.)

"The Supreme Court shall have power to refer all actions now pending therein, wherein any such receiver is a party, and where any controversy arises as mentioned in the first sections of this act, such reference shall in no way prejudice the proceedings already had. (§ 5.)

"The prevailing party shall recover the disbursements to the controversy only. This act shall not affect the costs already made in actions pending, and the costs now incurred in actions pending shall abide the event of the action, not to exceed twenty dollars in cases where no judgment has been entered. Costs on appeal may be allowed in the discretion of the Court, and may be absolute or directed to abide the event of the action." (§ 6.)

The referee, we observe, may "proceed upon written or oral pleadings." This is similar to the provision on trials before a Justice of the Peace. (2 R. S., 465, 2d Ed., § 47.)

The old practice was for the plaintiff to state his demand briefly, as for example upon a promissory note dated, etc. The Justice entered this, and the denial of its genuineness, or payment, or other defence.

Sands *vs.* Harvey (4 Abbott's Court of Appeals Decisions) was under this Statute. An objection that the act was unconstitutional was overruled. The action was on a note given by the defendant to the company. The proceeding was by a summons and complaint. The answer denied the right of the receiver to recover. The order of reference was made at Special Term.

The clause as to the powers and duties of the referee we notice is the same as in the Statute as to claims in behalf of the trustees of an insolvent debtor. (See the remarks as to this provision, *ante*, chapter xii., § 2.)

But there is the provision that upon the report judgment may be entered and be the judgment of the said Court, and on appeal to the General Term the Court may set the report aside. Certainly this appears to warrant a decision of a referee upon which a judgment may be entered without the intervention of the Special Term.

For the Forms in such a case, see Appendix, No. 74.

# APPENDIX.

*No. 1, page 6.—Consent to Refer.*

We hereby consent that the above-entitled action, and all the issues raised or to be raised therein, be referred to , counsellor-at-law, to hear and determine the same as sole referee.

Dated, etc.

*Plaintiff's Attorney.*

*Defendant's Attorney.*

*No. 2, page 6.—Order thereon.*

At a special term of the Supreme Court of the State of New York, held at , etc., on the 23d day of November, 1872:

Present E. L. F., Justice.

On reading and filing the written consent of the attorneys for the respective parties herein, and on motion of J. H. D., attorney for the plaintiff, it is ordered that the above-entitled cause, and all the issues raised or to be raised therein, be referred to , counsellor-at-law, as sole referee, to hear and determine the same.

(A copy) E. LOEW, *Clerk.*

*No. 3, page 8.—Affidavit to Obtain Reference.*

A. J., of the city of New York, being duly sworn, saith: That he is the plaintiff in this action; that the same is brought by him as executor of J. L., deceased, who was a member of the firm of J. L. & Co., of the city of New York, consisting of the said J. L. and of the defendant, B. D.; that such firm was engaged in extensive business for over five

years, in such city; that no settlement of the partnership accounts has ever taken place, according to the best of this deponent's information and belief; that the said defendant has disposed of a considerable portion of the property of such firm, and has collected debts belonging to it since the death of the said J. L.; and that the trial of this action will involve the examination of a long account on the side of both the parties thereto.

Sworn, etc.

*Affidavit of Attorney.*

J. D., being duly sworn, saith: That he is the attorney of the plaintiff in this action; that issue was joined therein on the day of , by service of the answer of the defendant, B. D., and that there are no other pleadings therein; that the complaint and answer are duly verified; that the action is for the settlement of partnership accounts, and will in deponent's judgment and belief, involve the examination of a long account, *on both sides.*

And this deponent further saith, that one issue raised upon the pleadings is, whether certain lots of ground and real estate, the title to which stands in the name of the defendant, was not purchased and paid for out of the funds of such firm, and for the use and benefit thereof.

Sworn, etc.

*No. 4, page 8.—Order of Reference thereon.*

At, etc.

It appearing to this court, from the affidavit of J. D., attorney for plaintiff, that this cause is duly at issue upon the complaint and the answer of the defendant, and that there are no other pleadings therein; and it further appearing, from the said affidavit, the affidavit of the plaintiff (as well as from the pleadings), that the trial of an issue of fact in such action will involve the examination of a long account; thereupon, on motion of Mr. H., attorney for plaintiff, and hearing Mr. W. on behalf of the defendant, it is ordered that this action and all the issues raised or to be raised therein,

be referred to H. D., of the city of New York, counsellor-at-law, as sole referee, to hear and determine the same.

And it is further ordered, that all parties produce to and leave with the referee, under oath, as he shall direct, all books, papers, deeds, and writings relating to the matter in controversy herein, or any of them.

[In another case of a partnership, the answer had set up agreement to dissolve, entered into some time before the testator's death, upon certain terms specifically agreed upon. If this was not proven the account would necessarily be a long one. This agreement was stated and urged in opposition to the motion for a reference; but the order was made.]

*No. 5, page 41.—Affidavit of Service Subpœna.*

A. C., of, etc., being duly sworn, saith: That he did, on the day of , in the city of New York, serve the annexed subpœna upon J. M., the witness named therein, by showing him such subpœna and delivering to him a subpœna ticket containing the substance thereof, and paying to him the sum of for his fees; and further, that such witness resides in the city and county of New York.

(Annex the subpœna.)

[The fees are regulated by 2 R. L., 64, §34.]

*No. 6, page 41.--Attachment thereon.*

The people of the State of New York to the sheriff of :

We command you to attach J. M., of the city of New York, and forthwith (or, on the day of , at o'clock in the forenoon of that day), to bring him before me at my office, in the , to answer for his contempt in not attending before me as a witness, pursuant to a writ of subpœna to him directed, and on him duly served, commanding him to appear at the time and place therein named, before me as sole referee, to give evidence in a certain action be-

tween A. M., plaintiff, and M. L., defendant, on the part of plaintiff, and have you there this writ.

Witness M. H., referee, at the city of New York, this day of

M. H., *Referee.*

R. C., *Attorney for Plaintiff.*

*No. 7, page 47.—Affidavit on Production,*

State of New York, etc.:

C. H., the defendant in this action, being duly sworn, saith: That the books, papers, and writings now produced, to and left with the referee in this action (and set forth in the schedule marked A, hereto annexed), are all the books, accounts, deeds, writings, and papers in his possession or under his control, or in the possession or under the control of any person for his use, relating to the matter in controversy in this cause, except [If any books, etc., are excepted as from being lost, they should be specified and accounted for.] (Fowler's Exch. Pr. 2, 237; 2 Turner's Practice, 42.)

*No. 8.—Certificate of non-Production.*

I hereby certify that the above-named defendant was duly summoned to produce before me all books, accounts, papers, and writings in his possession or under his control, relating to the matters in controversy in this cause, and to the accounts directed to be taken thereon by a day now past: of the service of which summons upon the said defendant, due proof has been made to me; that the said defendant hath not produced to me such books, accounts, writings, or any such; all which I certify and submit.

Dated

A. M., *Referee.*

(Hand's Solicitor's Assistant, p. 358.)

*No. 9, page 71.—Case.*

[The mode of making up a case varies according to circumstances and the judgment of attorneys. We think the following is the most convenient form.]

1. A prefatory statement of the course of the cause, with dates, thus:

This action was commenced by the service of a summons on the defendant upon the day of . Notice of an appearance was given by , as his attorney. The complaint was served on the . (To this a reply was served on the day of .)

An order of reference was made on the day of , appointing H. N., of, etc., sole referee, to hear and determine such action and all the questions therein. On the day of , such referee made his report and decision; judgment was entered upon the same on the day of , to which report and decision exceptions were filed on the day of . An appeal from such judgment was taken to the general term of this court on the day of

The complaint is as follows:
(Copy.)

The answer is as follows:
(Copy.)

The reply is as follows:
(Copy.)

The order of reference is as follows:

The action came on to be tried before such referee on the day of , and succeeding days; and the following proceedings were had:

The counsel for the plaintiff having stated the case and the pleadings, called as witness

[State the proceedings before the referee, with the evidence, or so much as relates to the questions raised on the appeal, the exceptions to the rulings, and all that took place on the trial pertinent to the points made by the unsuccessful party.]

At the close of the trial, and before the report was made,

the referee was requested, on behalf of the defendant, to find the following facts, viz:

Which facts (or the facts so proposed), numbered the referee has not found.

The report and decision of the referee is as follows:
(Copy.)

The judgment entered thereon is as follows:

To which judgment the following exceptions were duly filed:

An appeal was taken as follows:
(Copy notice of appeal.)

The referee is requested, on the part of the defendant, to find upon the settlement of this case, the following facts, viz.:

[The case as proposed is served and, with any amendments, submitted to the referee, who settles it, disallowing or adopting the new findings proposed, as he is advised.]

*No.* 10, *page* 87.—*Order of Referenee under* §271.

At a Special Term, etc.

Present,

This action coming on to be heard upon the pleadings therein, and it appearing from such pleadings (or, it being satisfactorily established) that the plaintiff is entitled to the relief sought, and it further appearing that the taking of an account is necessary for the information of the Court before judgment. Thereupon, on motion of of counsel for the plaintiff, and hearing on behalf of the defendant, it is ordered that it be referred to , residing in the , as sole referee, to take and state an account as to the trans-

actions mentioned in the complaint (and also as to those set up by way of counter-claim in the answer). And, for the better clearing of such accounts, the parties, or either of them, may be examined upon interrogatories, or orally, before such referee, as he shall direct. And all parties are to produce under oath, and leave with such referee, as he shall direct, all books, accounts, deeds, papers, and writings in their or the possession of either of them, or under their control, or that of either of them, relating to the matters in controversy herein. And all further directions are reserved until the coming in of the report.

*Affidavit for such Reference.*

State of New York, etc.

J. N., of the , being duly sworn, saith, that he is the attorney for the plaintiff in this action, that the same is at issue by answers of all the defendants therein, and that the place of trial is the City and County of New York, that such action is brought by the executor of a deceased partner against the surviving members of the firm for an account of the partnership assets and payment of such balance as may be found due to the estate of the testator. That the complaint herein, which is duly verified, sets forth the existence of a partnership between the said C. L., deceased, and the above-named defendants, from the day of , until the death of the said C. L., on the day of . That no settlement of accounts had been had between the parties, and that the transactions of the said firm were numerous and extensive. This deponent further states, that according to the best of his knowledge, information, and belief, the examination of a long account will be necessary upon the trial of the cause.

Sworn, etc.

[The affidavit as to the necessity of an account should be made by the party, where his knowledge, as in the case of a surviving partner, is the best. The affidavit of the attor-

ney may generally be as sufficient as that of an executor. The affidavit as to the situation of the cause and contents of the pleadings should most properly come from the attorney.]

*No.* 11, *page* 87.—*Summons or Notice.*

In pursuance of the order of reference made in this cause, I, M. H., the referee therein named, do hereby summon you, C. D., the (a) defendant therein, to appear before me at my office, No. street, in the City of New York, on the day of , at o'clock of such day, to attend upon the matters in reference before me in such cause, under such order.

Dated, etc.

(Signed)

(*Or*)

By virtue of an order of reference made in this cause, and dated the day of , I do appoint the day of , at o'clock in the noon of that day, at my office in the , to consider of the matters referred. At which time and place all parties concerned, or some one for them, are to attend.

Dated this

*Underwriting.* [To proceed upon such reference.]

[To produce books, accounts, and writings, under the decree or order.]

[To examine report.]

*No.* 12, *page* 89.—*Account of Executor.*

The account of the defendant, J. F., executor of the personal estate of H. B., deceased, exhibited before M. H., the referee in this cause, pursuant to an order therein, of the day of .

J. F., EXECUTOR, IN ACCOUNT WITH ESTATE OF H. B.

| 1870. | *Dr.* | | 1870. | *Cr.* | |
|---|---|---|---|---|---|
| Ap. 5. | To Cash Balances in Bank of.... | $1,200.00 | Ap. 15. | By Cash paid, Funeral Expenses. | $210.00 |
| | " Cash Note of J. C., paid..... | 120.00 | May 6. | " Paid Dr. P., Physician's Bill. | 200.00 |
| | Etc. | | | Etc. | |

*No.* 13.—*Affidavit to Account.*

State of New York, etc.

J. F., the defendant in this cause, and executor of H. B., deceased, being duly sworn saith that the above account to which this affidavit is annexed and marked A, does contain, to the best of this deponent's knowledge and belief, a just and true account of all sums of money as have been received by this deponent, or by any person or persons by his order or for his use, out of, or on account of, the estate of the said H. B., deceased; and that this deponent hath not, nor hath any person to his use, or by his order or consent, received any other or further sum of money, out of, or on account of such estate, than what is set forth in said account.

And this deponent further saith that the several sums of money mentioned in such account to have been paid or allowed, have been actually and in good faith paid and allowed by him, and that he believes all the items, both on the debit and credit side, of said account are correct and true; and that he doth not know of any error or omission in such account to the prejudice of any party in this cause.

Sworn, etc.

*No.* 14, *page* 95.—*Certificate of non-Attendance.*

I hereby certify that on the day of I issued a summons (or signed a notice) requiring the defendant, J. D., to appear before me on the day of , at o'clock of such day, at my office, in the , to be examined touching the matters to be inquired into under the order of this court, dated the day of , of the service of which summons (or notice) due proof has been

produced before me. Neither at which time, nor since, has the said J. D. attended to be so examined.

*No.* 14 *A*, *page* 95.

I hereby certify that I have considered the examination of the defendant, J. D., to the interrogatories exhibited by the plaintiff, (or I have considered the answers of the defendant, J. D., to the questions put to him on behalf of the plaintiff), and I find such examination (such answer) insufficient.

In not answering that he had set forth a full and true account of all the goods and merchandise referred to therein, and the sales and proceeds thereof; but in answering only that he had set forth a full account thereof so far as the plaintiff had any legal right thereto, or he was bound to discover the same.

Whereas, in my opinion, such defendant was bound to have alleged that he had set forth a full and true account thereof, or to have stated the grounds on which he was not legally bound to set forth any part of the same.

All which, etc.

(See Sharpe *vs.* Sharpe, 3 John. C. Rep., 407.)

*No.* 16, *page* 98.—*Report under* §271, *clause* 2.

In pursuance of an order of this court, made in the above cause, and dated the day of , I, the subscriber, the referee therein named, do report:

That I have been attended on behalf of the parties, plaintiff and defendant, herein, and have heard their allegations and proofs, and taken and stated the accounts directed by such order.

That the defendant, as surviving partner of the firm of F. B. & Co., after the death of the said F. B., the other member of such firm, proceeded to collect the outstanding assets of such firm, and to dispose of the merchandise and effects thereof, and that the avails and proceeds which have so come to his hands is the sum of $17,210. That he has

paid and discharged for debts of such firm, and for necessary expenses, the sum of $4,230, leaving a balance in his hands of the sum of $12,980.

That the plaintiff, as executor of the said , is entitled to one half of the above balance; namely, the sum of $6,490.

That the defendant had, at the death of the said , drawn from the firm the sum of $1,200, and the said the sum of $900; and that the defendant owes the said executor, in addition to the above sum of $6,490, the sum of $150; making together the sum of $6,640. That there remain outstanding of the assets of such firm various book accounts and promissory notes, some of which are in suit; and that it has been agreed by and between the parties that the said defendant proceed to collect the same and account hereafter for the avails thereof.

I further report that the said defendant, after the death of the said , loaned to his brother, one , the sum of $700 of the money of such firm upon his promissory note merely; that the said has become wholly insolvent, and the said sum remains unpaid, and that the defendant has claimed the said sum should be credited to him in account, which I have disallowed.

All which, etc.

*No. 16, page 99.—Objections to Report.*

Objections taken by the defendant, J. D., to the report of the referee in this cause, as prepared by him.

*First.* For that the said referee has disallowed a claim for the sum of $1,200 paid out by the defendant for the services of J. D. as clerk of the firm down to the date of the dissolution thereof.

*Second.* For that such referee has disallowed the claim for the sum of $200, paid to J. W. as counsel in and relating to the matters of such firm.

Dated, J. D., *Att'y.*

*No.* 17, *page* 113.—*Statement on the Basis of* $100 *due, of* $50 *Paid at the End of Six Months, and* $50 *at the End of the Year.*

No. 1.

| | | |
|---|---|---|
| Amount due | $100 00 | |
| Interest one year | 7 00 | |
| By cash end of six months | | $50 00 |
| By cash end of year | | 50 00 |
| Balance | | 7 00 |
| | $107 00 | $107 00 |

No. 2.

| | | |
|---|---|---|
| Amount due | $100 00 | |
| Interest six months | 3 50 | |
| Amount paid | | $50 00 |
| Balance end six months | | 53 50 |
| | $103 50 | $103 50 |
| Balance due | $53 50 | |
| Interest six months | 1 87 | |
| Amount paid | | $50 00 |
| Balance due | | 5 37 |
| | $55 37 | $55 37 |

No. 3.

| | | |
|---|---|---|
| Amount due | $100 00 | |
| Interest one year | 7 00 | |
| By cash end of six months | | $50 00 |
| Interest on same six months | | 1 75 |
| By cash paid end of year | | 50 00 |
| Balance due | | 5 25 |
| | $107 00 | $107 00 |

| | | |
|---|---|---|
| Difference between 1 and 2 ..... 7—5.37 | $1 63 | |
| Difference between 1 and 3 ..... 7—5.25 | 1 75 | |
| Difference between 2 and 3 | 12 | |

$1.63 is the interest on $46.50 for 6 months, principal sum.
1.75 is the interest on $50 for 6 months.
.12 is the interest on $3.50 for 6 months,

## *No. 18, p. 116.—Statement in King vs. Talbot.*

| | Dr. | | Cr. |
|---|---|---|---|
| 1846, Sept 26..To Debits | $1,065 80 | 1846..Interest on Legacy | $900,00 |
| 1847, " " Int. on $165.80.. | 11 60 | 1846.. " " | 900 00 |
| " " " Debits | 747 36 | " Balance | 24 76 |
| | $1,824 76 | | $1,824 76 |
| 1847, Sept. 26..To Balance | $24 76 | 1848..Interest on Legacy | $900 00 |
| 1848, " " Interest | 1 73 | 1849.. " " | 900 00 |
| " " " Debits | 894 19 | 1850.. " " | 900 00 |
| 1849, " " " | 859 85 | | |
| 1850. " " " | 47 39 | | |
| " " " Balance | 872 08 | | |
| | $2,700 00 | | $2,700 00 |
| 1851, Sept. 26..To Debits | $866 25 | 1850..Balance | $872 08 |
| " " " Balance | 905 83 | 1851..Interest on Legacy | 900 00 |
| | $1,772 08 | | $1,772 08 |
| 1852, Sept. 26..To Debits | $316 26 | 1851..Balance (*a*) | 905 83 |
| " " " Investm't act.. | 1,000 00 | 1852..Interest on Legacy | 900 00 |
| " " " Balance | 489 57 | | |
| | $1,805 83 | | $1,805 83 |
| 1853, Sept. 26..To Debits | $382 36 | 1852..Balance | $489 57 |
| 1854, " " " | 397 56 | 1853..Interest on Legacy | 900 00 |
| " " " Investm't act.. | 1,000 00 | 1854.. " " | 900 00 |
| " " " Balance | 509 65 | | |
| | $2,289 57 | | $2,289 57 |
| 1855, Sept. 26..To Debits | $1,199 47 | 1854..Balance | $509 65 |
| " " " Int. averaged. | 38 00 | 1855..Interest on Legacy | 900 00 |
| " " " Balance | 172 18 | | |
| | $1,409 65 | | $1,409 65 |
| 1856, Sept. 26..To Debits | $583 38 | 1855..Balance | $172 18 |
| " " " Balance | 488 80 | 1856..Interest on Legacy | 900 00 |
| | $1,072 18 | | $1,072 18 |
| 1857, Sept. 26..To Debits | $1,460 00 | 1856..Balance | 488 80 |
| " " " Int. averaged. | 52 00 | 1857..Interest on Legacy | 900 00 |
| | | " Balance | 123 20 |
| | $1,512 00 | | $1,512 00 |

(*a*) By the above statement there was due Sept. 26, 1851, $15,905.83. By the account as made out, after the decision in the Court of Appeals, it was $15,905.87.

| | | |
|---|---|---|
| 1852..Assumed investment | $1,000 00 | |
| Compound interest, 5 years | 337 98 | |
| 1854..Assumed investment | 1,000 00 | |
| Compound interest, 3 years | 190 76 | |
| 1857..Balance in favor of Executor | | $123 20 |
| Balance income account | | 2,405 54 |
| | $2,528 74 | $2,528 74 |
| 1857..Capital | | $15,000 00 |
| " Balance down | | 2,405 54 |
| | | $17,405 54 |
| The restated account | | 17,328 67 |
| Difference | | $76 87 |

*Mem.*—The debits from 1845 to 1846 (Sept. 26) were advances, and had interest allowed from the date of each charge. In 1846 the first sum for interest on the legacy ($15,000 at 6 per ct.) is to be credited. That left $165.80 due, and the interest on that sum for a year is allowed. Then, Sept. 26, 1847, upon crediting the further sum of $900, there is a balance of $21.76. Then we find that down to Sept. 26, 1850, the debits and credits are so equal that no stoppage of the account is called for. That then $872.08 is found due. And the next year's debits exhaust it except $5.83. Then adding the $900, we have, Sept. 26, 1851, due, $905.83.

At the close of 1852 $1,895.83 is the credit and $316.26 the debit of the preceding year. This allows of an investment of $1,000 and yet leaves a balance of $489.57 for the next year's charges. Then, until Sept. 26, 1854, no stoppage is required; but at that date there would be $1,000 for investment and a balance of $509.65 for the ensuing year.

The debits of 1855 were more than twice this balance. I have averaged the interest so as to allow it upon the excess of advances.

The rest of the account to Sept. 26, 1857, is simple, ending in a balance of $123.20 in favor of the executor.

Then the statement assumes that upon the sum taken as invested compound interest is to be allowed. The result on this basis is shown to be, Sept. 26, 1857, $17,405.54.

The interest is compounded at 6 per cent. The charge upon the legacy is fixed by the decree of the Court of Appeals at that rate.

But it may be that the interest was not to be compounded. Annual rests do not by force of the term mean this:

| | | |
|---|---|---|
| 1852.. | Treated as invested | $1,000 00 |
| | Interest 5 years | 300 00 |
| 1854.. | Treated as invested | 1,000 00 |
| | Interest 3 years | 180 00 |
| | | $2,480 00 |
| 1857.. | Balance | 123 20 |
| | | $2,356 80 |

*No.* 19, *page* 119.—*Mode of Stating Commission.*

| | | | | | | | |
|---|---|---|---|---|---|---|---|
| On the sum of | $12,000 | 2½ | per cent. | receiving | ..... | ...$1,000 | $25 00 |
| " | " | " | 1¼ | " | " | ..... 9,000 | 112 50 |
| " | " | " | ½ | " | " | ..... 2,000 | 10 00 |
| | | | | | | | $147 50 |

If the account is closed, and the balance which may be on hand paid over, or certain of being paid, the above sum ($147.50) is allowed for paying. But if the account is such as guardians are to file annually and to continue, the allowance for paying is, of course, only on the sums actually disbursed, and then according to the above half-rates.

It was settled in the case of Hedges *vs.* Riker, July, 1821, that the commissions are to be computed on the aggregate of receipts and payments, not upon each sum as received and each as paid. The rule has remained unchanged since.

(Hoffman's Masters in Chancery, 131.)

In the Precedents annexed to the rules of the Supreme Court, adopted in 1848, the mode of stating the commissions on an account rendered and filed annually is given. It is by charging at the half-rates for the sums received during the year, and in the same mode upon the actual payments.

*No.* 20, *page* 124.—*Order under* § 271. *Specific Fact.*

It appearing upon the pleadings in this cause that the action is brought for the settlement of partnership accounts and transactions between J. L., the testator named in the complaint, and the defendants herein surviving, of the firm of J. L & Company, and which would involve the examination of a long account on the part of the plaintiff; and it being alleged in the answer of the defendants that prior to the death of the said J. L. it was mutually and fully agreed that the said J. L. should withdraw from such firm, and should surrender and release all his interest and right therein upon the transfer to him of certain securities, and the payment of a certain sum of money agreed to be given and

taken in full satisfaction for such interest and right; that the sudden death of the said J. L. prevented the completion of such agreement. Thereupon, on motion of , counsel for the defendants, and hearing on behalf of the plaintiff, it is ordered that it be referred to , of etc., as sole referee, to inquire into, and report upon, such specific question of fact as to such agreement as is alleged in such answers, and to state any special matters relating to the same.

*No.* 21, *page* 124.—*Report upon such Order.*

To the Justices of the Supreme Court:

In pursuance of an order of this Court, made in the above cause, and dated the day of , whereby it was referred to me as sole referee, to inquire into and report whether such agreement, such as is set up in the answer, was entered into in the lifetime of the said , and to state any special matter respecting the same, I report:

That I have been attended on behalf of the parties to this action, and have taken testimony respecting such matter directed to be inquired into, and I find that on or about the day of , the said , deceased, did enter into a parol agreement with the defendant above-named, by which he was to withdraw from such firm then existing between them, and was, as the consideration thereof, to receive four promissory notes, each for the sum of $1,000, payable at three, six, nine, and twelve months, and secured by a deposit of various certificates of stock to be procured and left with a person to be designated. That instructions were given by the said J. L., in presence of the defendant, to have proper papers prepared to carry such agreement into effect. That such papers were prepared about the day of , but that the said J. L. died suddenly on the day of , and did not transact any business from the day of , (two days after the instructions). Hence I am of opinion that such agreement was duly entered into.

*No.* 22, *page* 128.—*Order under* §§ 296 and 300.

It appearing by the affidavit of J. B. that an execution against the property of L. R., the defendant above named, having been returned unsatisfied, the sheriff of the county of , in which county such defendant resided, and now resides, on motion of , attorney for the plaintiff, it is ordered that the above-named defendant appear and answer concerning his property before W. M., a referee hereby appointed for that purpose, on the day of , at o'clock in the of such day, at his office, No. , or at such time and place as shall be appointed by such referee. And such referee shall take the said examination, and certify and return the same.

*No.* 23, *page* 128.—*Report upon such order.*

To the Honorable

In pursuance of an order made in the above cause, and dated the day of , I, the subscriber, the referee therein named, do report, That I have been attended on behalf of the plaintiff in this action, and the defendant appeared before me and was examined under oath concerning his property.

That it appears from such examination that he has a claim under the writ of J. F. for a legacy of $300; that the said J. F. died on or about the day of last, but that probate of his will has not yet been granted, the validity of such will being contested.

And also that J. R., of the City of New York, is indebted to the said defendant in the sum of $250 for money lent to him and which remains unpaid.

The examination taken by me is hereto annexed.

*No.* 24, *page* 133.—*Affidavit under* § 401.

J. D. being duly sworn, deposeth and saith that he is the attorney of the defendant in this action; that the sam is brought to establish a lien upon certain shares of stock of

the Insurance Company, now standing in the name of the defendant, and alleged to have been agreed to stand as a security and pledge for an alleged loan, made by the plaintiff to the defendant. That an injunction order was granted on the day of , restraining the defendant from transferring or disposing of such shares of stock. That the defendant has set up in his answer that it had been mutually and fully agreed between the said plaintiff and defendant that such lien should be surrendered and discharged upon a delivery and transfer to such plaintiff of a promissory note made by one C. L., in favor of the defendant for the the sum of $ . That such note was duly tendered to the said plaintiff, but he refused to accept the same.

This deponent further saith that he intends on behalf of the defendant to move for a dissolution of such injunction. That he is informed and believes one L. B. was present at, and can prove the agreement as to such last-mentioned promissory note; that an affidavit to that effect has been offered to the said F. B., who has declined to make the same.

*No.* 24, *page* 133.—*Order of reference under* § 401.

At, etc.,

On reading an affidavit of J. D., made in this cause, and on motion of the said J. D. it is ordered that it be referred to W. N., Esq., of the , to take the affidavit or deposition of T. B., of , mentioned in such affidavit.

*No.* 24, *page* 133.—*Certificate under order.*

To, etc.,

I certify that in pursuance of an order of this Court, dated the day of , I, the subscriber, the referee thereby appointed, have taken the affidavit of F. B. in such cause. Such affidavit is hereto annexed, marked A.

All which is submitted.

*No.* 25, *page* 137.—*Affidavit under* § 222. *Injunction.*

being duly sworn saith that he is the defendant in this action; that an injunction order was heretofore issued in favor of the plaintiff against this defendant, and such plaintiff executed an undertaking thereupon in the sum of $ , with as his sureties; that upon argument, such injunction order was discharged, that a final judgment in favor of this defendant has been made and entered, in which it is adjudged that such plaintiff was not entitled to the said injunction. That no appeal has been taken from such judgment. And deponent further saith that he has suffered damages from the granting of such injunction order.

*No.* 26, *page* 137.—*Order of reference on.*

At, etc.,

An injunction having been heretofore granted herein, and an undertaking entered into in the sum of $ with as sureties; and the said injunction having been dissolved; and the Court having finally decided that the plaintiff was not entitled thereto; and a final judgment having been entered in favor of such defendant, on motion of for such defendant, and hearing Mr. , it is ordered that it be referred to , of etc., as sole referee, to ascertain the damages, not exceeding the said sum of $ , which the said defendant has sustained by reason of such injunction. And such referee is to summon before him as well the sureties in such undertaking as the plaintiff.

*No.* 27, *page* 137.—*Report under such order.*

To, etc.,

In pursuance of an order of this Court, dated the day of , I, the subscriber, the referee herein named, do report:

That I gave notice to the parties in this action, and also to the sureties in the undertaking given therein upon ob-

taining the injunction, and have been attended on behalf of all of them.

And from the proofs laid before me I find that the amount of damages which the defendant has sustained by reason of the said injunction order granted in this case is the sum of $ .

That such sum is made up of the following items of damages, namely: the sum of $ , the difference between the market value of the goods, the sale of which was enjoined, on the day of the service of such injunction order, and the day when the same was dissolved.

And the sum of $ for the defendant's reasonable counsel fees paid by him, or in which he is liable, for services in and relating to such injunction order.

The sum of $ , my fees as referee, and any costs the defendant may be entitled to.

All which, &c.

*No.* 28, *page* 140.—*Under* § 72 *and rule* 40. *Order of reference to settle issues.*

At a Special Term, etc.,

On reading and filing the affidavit of , the attorney for the above-named plaintiff (or defendant), showing that this cause is at issue, and is in readiness to take testimony therein, and proving service of notice of motion to settle the issues of fact joined therein; and on hearing Mr. , of counsel for the plaintiff (or defendant), and no person appearing to oppose, it is ordered that the issues of fact, joined by the pleadings in this action between the respective parties thereto, be settled, pursuant to rule 33, to the end that testimony may be taken thereon. And it is further ordered, That, for the purpose of settling the said issues, the pleadings in this action be referred to , as referee to ascertain and settle the said issues in the form of questions to be answered, wherein shall be stated the several questions of fact to be passed upon, the names of the parties to each issue, and which party is to be con-

sidered as holding the affirmative on each question to be tried.

And it is further ordered, That the said referee do summon before him, on such reference, all the parties entitled to take testimony in the cause; and that on the coming in and confirmation of his report, the testimony taken in the cause shall be directed and confined to the issues thus settled. [Settled by Judge Edmonds, 1 Barbour, S. C. Rep. 222.]

*No.* 29, *page* 140.—*Issues proposed.*

[The notice of motion is to specify the questions, and in such form as to be incorporated in the order. The form is shown in the report of the settling issues in the next precedent.]

*No.* 30, *page* 140.—*Report of settling issues.*

To, etc.,

I, the subscriber, the referee named in an order in this cause dated the day of , do report,

That I have settled the following as the issues to be tried by a jury on the part of the plaintiff:

1. Whether an instrument in writing dated the day of , purporting to be a deed from the plaintiff to the defendant was, when delivered and accepted, accompanied with any instrument in writing declaring, or purporting to declare, that the same was held for securing the payment of three promissory notes alleged to have been given by the said plaintiff to the defendant.

2. Whether such instrument was given and received for the payment of any promissory notes or evidences of debt given by the said plaintiff to the defendant.

3. Whether if any such instrument in writing was made and delivered, the same has been lost, destroyed, or what has become of the same?

4. Whether such deed or instrument was executed, deliv-

ered and accepted for the purpose of securing payment of any sums of money owing at the time by the said plaintiff to the said defendant.

5. Whether the notes, or evidences of debt, or money, to secure which such instrument was given and held, have been paid and discharged.

Settled and approved this day of .

M. H., *Referee.*

*No.* 31, *page* 149.

*Waiver and consent in an adultery case.*

The action being brought to obtain a divorce for the alleged cause of adultery committed by the defendant, and being at issue upon the answer denying the same, it is hereby stipulated and agreed that a trial by jury of the issue (or issues) in this cause be and the same is hereby waived.

And it is further stipulated and agreed that this action, and all the issues therein, be, if the same is consented to by the Court, referred to as sole referee to hear and determine the same.

Dated,

, *Att'y for Pl'ff.*
, *Att'y for Def't.*

*No.* 32, *page* 151.—*Order upon above consent.*

At a Special Term, etc.,

Upon reading a written consent and stipulation in this cause, signed by the attorneys of the respective parties, waiving a trial by jury therein, and consenting to a reference of the same. Now, upon filing such consent with the clerk, and with consent of the court now given, it is ordered that this action, and all the issues therein, be referred to , as sole referee, to hear and determine the same.

*No.* 33, *page* 165.—*Report in adultery case.*

To, etc.,

In pursuance of an order of this court made in the above cause, and dated the day of , I the subscriber, the

referee appointed thereby to hear and determine such cause and all the issues therein, do report, that I have been attended on behalf of the parties plaintiff and defendant herein, and have heard their allegations and proofs, and I find these facts:

1. That the plaintiff and defendant were married on the day of , in the .

2. That the issue of such marriage are the following: (Names and ages.)

3. That the plaintiff and defendant were, at the time of the commission of the adultery hereafter mentioned, inhabitants of this State.

4. That the defendant, on or about the day of , at the City of , committed adultery and had carnal intercourse with one C. M. (with a woman generally known as A. L.) State other instances if proven. (If the answer has set up a bar such as the guilt of the plaintiff, forgiveness, etc., the referee must find as to such allegation. But I apprehend that these matters need not be negatived unless set up.)

5. That the defendant is possessed of property, yielding an annual income of about the sum of $ , and that the sum of $ is a proper allowance to be made to the plaintiff for the support of herself and the children of such marriage, to be paid half-yearly.

*Conclusions of Law.*

That the plaintiff is entitled to a judgment dissolving the marriage contract between her and the defendant.

That she is entitled to the care and custody of the children of such marriage.

That the annual sum of $ should be allowed to the plaintiff for her support and the support and education of the said children, to be paid to the plaintiff or her order quarterly.

And I direct that judgment be entered accordingly.

Dated, etc.,

*No. 34.—Order to settle issues.*

At, etc., on the 7th Feb., 1873.

Present.—Hon. G. C. BARRETT, Justice.

E. J.,
*vs.*
V. W. J.

On reading the pleadings in this cause, an order to show cause why issues should not be settled for trial by a jury, the affidavit of the plaintiff's attorney, the issues proposed by the plaintiff, and those proposed by the defendant, and after hearing counsel for the respective parties, on motion of , the plaintiff's attorney, it is ordered, that this action be, and the same is hereby referred to M. H., of the City of New York, counsellor-at-law, to settle the issues in the same and their form for trial by jury.

V. W. J.
*vs.*
E. J.

At, etc., held, etc., the 20th of Feb., 1873.

The order in this case was so similar to the above that it need not be copied.

*No. 35.—Issues in adultery case.*

SUPREME COURT.

E. J.,
*vs.*
V. W. J.

V. W. J.,
*vs.*
E. J.

Issues to be tried on the part of E. J., the plaintiff in the first entitled action, and defendant in the second action.

*First.* Did V. W. J., at any time between the 11th day of and the 26th day of May, in the year 1866, commit adultery and have carnal intercourse with one H. A. G., on board the , on her voyage from to .

*Second.* Did the said V. W. J. commit adultery and have carnal connection with one J. L. B., at her residence called , in the village of , county of , State of New York, on the 13th, 15th, 16th, and 26th days of July, in the year 1871, or on any or either of such days.

*Third.* Did the said V. W. J. commit adultery and have carnal intercourse with one J. L. B. at any other time during the month of July, 1866, at the residence of the said V. W. J., in the village of , county of , State of .

[There were numerous other questions settled as to other acts specified in the pleadings which it is needless to state. The approval was:]

The above are the issues on the part of E. J., as settled and approved of by me for trial by a jury.

New York, March , 1872.

M. H., *Referee.*

SUPREME COURT.

| | |
|---|---|
| V. W. J., *vs.* E. J. | Issues to be tried on the part of V. W. J., plaintiff in the first and defendant in the second entitled action. |
| E. J., *vs.* V. W. J. | |

*First.* Did the said E. J. commit adultery and have carnal intercourse with one J. L. B., in the City of New York, on the day of , in the year .

*Second.* Did the said E. J. commit adultery and have carnal intercourse with one , in the said City of New York, on any day in the month of July, in the year .

[Numerous other specific issues were settled upon numerous specifications in the answer in the first, and complaint in the second cause.]

*Note.*—Great pains were taken by counsel in the above cases, and a memorandum of the referee may be found useful.

| | |
|---|---|
| E. J., *vs.* V. W. J. | Memorandum. |
| V. W. J., *vs.* E. J. | |

The plaintiff in the first of the above actions commenced his suit on the 16th of Nov., 1872, for a divorce from his wife on the ground of adultery. The answer was sworn to on the 29th of November of that year.

The complaint in the second action was served on the 6th of December, 1872, and answered on the 26th of that month.

The complaint in the first action sets forth numerous acts of adultery with specific times and places, with one G., and also with one B.

The answer of the wife denied all the allegations of adultery, and set up that of the husband with numerous specifications.

In her complaint she repeated the charges of adultery contained in her answer, and prayed a dissolution of the marriage, etc. The answer of the husband denied these allegations, and restated the charges against her made in his complaint.

I must assume upon these pleadings and the order, that the second action, that of the wife, was necessary to enable her to obtain full relief if she succeeded, even though under the first action the husband should fail. Of course under the statute (2 R. S. 145, § 42–6) the former adultery of the husband will be a bar to a judgment, even if he prove the guilt of the wife.

In the case of J. M. B. *vs.* F. D. B. (11 Legal Observer, 350), and in an anonymous case (17 Abbott's Reports, 18), it was held that, upon a recriminatory answer, relief by a divorce could be given to the defendant.

But in R. T. H. *vs.* L. H., Monroe, 1862 (40 Barbour, 10), the majority of the Court held otherwise. Other cases such as Griffin *vs.* Griffin, (23 Howards R. Rep.,) 183, are not decisive.

It also deserves consideration whether the plaintiff may not, by dismissing his complaint, preclude the defendant from relief upon a recriminatory answer. It may be doubted whether such a dismissal could be had after issues had been settled and ready for trial, or an order of reference directed. See Hoffman's Ch. Pr., vol. 1, 327, and cases.

The 89th rule of the Supreme Court provides that the defendant may set up the adultery of the plaintiff as a bar to a divorce; and if issue be taken, it shall be tried at the same time and in the same manner as the other issues of fact in the cause. (See also Smith *vs.* Smith, 4 Paige, 434.)

After hearing the views of counsel and considerable reflection, I think the form should be of issues on the part of the husband as plaintiff in one suit and defendant in the other; and conversely, issues on the part of the wife. All would, under the rule, be tried at the one time. The Court will regulate at the trial the order in which they shall be tried.

I have considered that each issue should be perfect in itself as to time, place, and circumstances; so that no reference to another issue be necessary to complete it. The answers of the jury will then be more explicit.

*No.* 36, *page* 183.—*Order in action for a separation.*

D.
*vs.*
D.

At, etc.,

This action being brought to obtain a judgment for separation, or limited divorce, by reason of the cruel and inhuman treatment of the plaintiff by the defendant, or by reason of the abandonment by the defendant of the plaintiff, and his neglect to support her, on motion of , on

reading and filing a written consent to that effect, and on motion of , of counsel for the plaintiff, it is ordered that it be referred to , of the City of New York, to hear and determine this cause and all the issues therein.

*No. 37, page 190.—Report under such order.*

SUPREME COURT.

D.
*vs.*
D.

To the Justices of the Supreme Court:

In pursuance of an order made in this cause, and dated the 9th day of May, 1873, I, the subscriber, the referee named therein, do report:

That I have been attended on behalf of the parties, plaintiff and defendant herein, and having heard their allegations and proofs, I find, as facts—

1. That the defendant has abandoned the plaintiff, and has refused and neglected to provide suitably for her support.

2. That the sum of eight hundred dollars ($800), payable half-yearly, is a suitable and proper allowance to be made by such defendant to the plaintiff for alimony and support upon a separation being adjudged; the same to commence on the 15th day of May, 1872 (commencement of action).

*Conclusion of Law.*

That the plaintiff is entitled to a judgment of separation from bed and board against the defendant, and as part thereof to a provision directing the payment of the sum of eight hundred dollars a year, in half-yearly payments, to the plaintiff, or her order, commencing the 15th day of May, 1872.

And I direct that judgment be entered accordingly.

New York, December 4, 1873.

*No.* 38, *page* 197.—*Order of reference. General guardian of infants.*

In the matter of M. S., an infant.

A petition having been presented to this Court for the purpose of having a general guardian appointed for the above-named infant, on motion of , attorney for the petitioner, it is ordered that it be referred to , as sole referee, to ascertain and report as to the truth of the facts therein stated, and particularly to ascertain the age of such infant; and if of the age of fourteen years or upwards to examine him as to his voluntary nomination of a suitable person as guardian; and if under that age to ascertain who is entitled to the guardianship, and to name a proper and competent person as guardian. And, further, such referee shall ascertain the amount of the personal property, and the gross amount or value of the rents and profits of the real estate of the infant during his minority; and also the sufficiency of the security offered by the guardian; and whether the security directed by the 66th rule of the Supreme Court might not be varied for the interest of the infant, and the special circumstances for such variation, and how the security should be given.

*No.* 39, *page* 198.—*Report under above order.*

To, etc.,

In pursuance of an order of this Court made in the above matter, and dated the day of , I, the subscriber, the referee therein named, do report:

That I caused notice of the proceeding before me to be given to J. D., mother of such infant, with whom he resides, and also to C. B., his uncle; that I have been attended by such uncle and by the said infant, as well as by J. H., his attorney.

I find and report that the said infant is over the age of

fourteen years, to wit, of the age of seventeen and upwards. And the said infant did nominate before me the said C. B., his uncle on the father's side, to be his general guardian; and from the proofs before me I am of opinion that the said C. B. is a suitable and proper person to be appointed such guardian.

And I further report that the amount, nature, and value of the real and personal property of the said infant is correctly stated in the said petition; that the personal estate of such infant amounts to the sum of $ the gross amount, or value of the rents and profits of the realty is about the sum of $ annually; and the aggregate amount of such rents and profits during the minority of such infant will be the sum of $ .

That such guardian hath proposed G. M. and E. G. of the City, etc., as his sureties, and having taken from each of them an affidavit as to his sufficiency, and made inquiries relating thereto, I am satisfied of their sufficiency, and that each of them is worth the sum of (the amount of the bond) over and above his debts.

I further report that the security to be given by such guardian should be his bond in the penal sum of $ , with the said G. M. and E. G. as his sureties.

[The penalty is to be double the amount of the personal estate, and of the gross amount or value of the rents and profits during the minority.]

*No. 40, page 203.—Order sale real estate.*

In the matter of C. H., an infant.

At a Special Term, etc.,

On reading and filing the petition of C. H., an infant over the age of fourteen years, who has no general guardian, by A. H., his mother and next friend, praying for the sale of certain real estate of such infant therein described, and for the appointment of B. H. as special guardian for the pur-

pose of such sale; and it appearing to this Court that there is reasonable ground for the application, on motion of , it is ordered that the said B. H. be, and he is hereby appointed special guardian of the said C. H., for the purpose of such sale, on his executing, together with J. D., of , and J. B. of , as his sureties a bond to the said C. H. in the penalty of , conditioned for the faithful performance of, etc.; which bond shall be approved of as to form, contents, and manner of execution, by the referee hereafter named, (by one of the justices of this Court).

And it is further ordered that it be referred to H. N., of the City of New York, to ascertain and report the truth of the facts stated in the said petition, and whether a sale of the premises described therein, or of any part of the same, and what part, would be beneficial to the said infant, and the reasons therefor. That he also report the value of the property proposed to be sold, and of each separate lot or parcel thereof, and the terms and conditions on which it should be sold, and whether the said infant is in absolute need of any and what part of the proceeds of a sale for support and maintenance over and above the income thereof and of his other property, together with what he might earn by his own exertions.

And that such referee also ascertain the value of the dower-right and estate of the said , as widow of the father of such infant, on the principle of life annuities.

And such referee shall not proceed on such reference, until a certificate of the clerk shall be laid before him, that the bond required to be giveu by such guardian has been duly filed.

*No.* 41, *page* 204.—*Report on such order.*

To, etc.:

In pursuance of an order in this Court, made in the above cause, and dated the day of , I, the subscriber, the referee therein named, do report:

1. That I have been attended on behalf of the petitioner, the

general guardian of the infant G. H. (or the special guardian of the infant G. H., for that purpose appointed), and that a certificate of the Clerk of this Court has been produced to me of the security required having been duly filed. And I summoned S. M. and C. M., the nearest relatives of such infant, to appear before me; and having taken testimony as to the matters referred to be inquired into, I report:

That the material facts stated in the petition of such guardian are true; and that a sale of the whole of the premises mentioned and described in such petition would be for the benefit of such infant; and that my reasons for such opinion are as follows:

That the said premises consist of two lots of ground in the Ward of the city of New York wholly unimproved, and yielding a rent of about $ annually, about sufficient to pay the taxes and charges thereupon. That each of such lots is worth about the sum of $ ; and from the character of the buildings and improvements in the neighborhood, and in progress, a high price and full value may be reasonably expected from a sale. That such infant has no personal property or other real estate (or the personal property of such in fund consists, etc., yielding an annual income of $ wholly inadequate for his support and education).

That the said , the guardian, has advanced the sum of $ for the support and education of such infant since the death of his father.

That the mother of such infant is willing to unite in such sale, and that the value of her life interest in the property is the sum of $ .

That I am of opinion that such lots should be sold separately, and should be sold on the following terms and conditions:

That the purchaser or purchasers pay in cash to such guardian the costs of these proceedings, and to the said , the widow, the said sum of $ , and the residue be secured by a bond and mortgage or bonds and mortgages of such purchaser or purchasers, to be given to the Clerk of

this Court, conditioned to pay the interest half-yearly, and the principal upon such infant arriving at age.

And I further report, that such infant is not in absolute need of any part of the proceeds of the sale for his support and maintenance over and above the income to arise from such sale, and that such infant is of the age of nine years, and not earning anything by his own exertions.

*No. 42, page 208.—Order Contract of Ancestor.*

In the matter of J. M., an Infant.

At, etc.:

It appearing from the petition of J. D., dated the day of , and duly verified, that on or about the day of the said J. D. entered into written contract with C. M., deceased, by which the said C. M. agreed for a certain consideration therein expressed to sell and convey to the petitioners a lot of land, being in the , and more particularly described in such petition, such conveyance to be made and delivered on or before the day of , then ensuing.

That the said C. M. departed this life on the day of intestate, leaving such contract unexecuted, and leaving the above-named J. M., an infant under the age of twenty-one years, his sole heir-at-law, upon whom the legal estate to such parcel of ground has descended. That there remains the sum of $ due upon such contract for the purchase money, a deposit of $ having been made at the time of such agreement.

Now, on motion of , it is ordered that it be referred to D. I., of the , to examine into the truth of the facts stated in such petition, and that he cause notice to be given to , the general guardian of such infant, to appear before him on such reference.

[If there is no general guardian, a guardian *ad litem* should be appointed.]

*No. 43, page 208.—Report upon this Order.*

In the matter of J. M., an Infant.

To, etc.:

In pursuance of an order of this Court, made in the above matter, and dated the day of , I, the referee named therein, do report:

That I have been attended by the counsel of the petitioner, and also by the general guardian [or, the guardian of the in-infant J. M., for that purpose appointed] and have examined into the truth of the matters set forth in such petition.

And I find and report that a contract as stated therein, bearing date the day of , a copy of which is hereto annexed, has been produced before me; that the execution of the same was duly proven (by the subscribing witness thereto); that the sum of $ was paid as a deposit on the execution of the same; that the said C. M. named therein, and father of the above-named infant, died on the day of intestate, and that such infant is his only heir-at-law.

I also report, that there remains due, for the balance of such purchase money, the sum of $ , and that there should be a performance of such contract by a conveyance of the premises by the above-named infant to the said J. D., the purchaser.

The proofs taken by me upon such reference are hereto annexed, marked .

All which, etc.

[In one case there was a widow, and she consented to take a sum in gross for her dower-right. The report upon this point was as follows:

I further report, that E. M., the widow of the said C. M., has consented to release her dower-right in the said premises, as appears by a written consent, under her hand and seal

hereto annexed, upon receiving a gross sum therefor. That such widow is of the age of years, and that the value of her dower-right in the premises, based on such purchase-money, is the sum of $ .]

*No.* 43 *A.—Final Order.*

In the matter of the Petition of .

At, etc.:

The report of M. H., the referee, appointed by an order of the day of , made herein, having been filed on the day of , and no exceptions having been filed thereto. Now, on reading such report, and on motion of , counsel for the petitioner, and the guardian *ad litem* of the infant named in such petition attending, it is ordered that the said A. M., the infant heir above-named, do execute a conveyance in fee of the lot of land and premises mentioned in the petition to the said , the petitioner, such conveyance to be approved of by such referee, and to be duly acknowledged, and deposited with such referee.

And it is further ordered, that the sum of $ , the unpaid purchase-money, be paid into Court, to abide its further order; and that such referee, upon receiving a certificate of the Chamberlain of the city of New York (or the County Treasurer of the county of ) that such sum has been deposited with him, to the credit of this matter, do deliver such conveyance to the said petitioner.

[In another case, where there had been a general guardian appointed with adequate security, the order directed the referee to pay the widow the amount fixed upon her releasing, and the residue to such guardian.]

*No. 43 B.—Order as to Infant Trustee.**

In the matter of , an Infant.

Upon reading and filing the petition of , duly verified, and upon motion of , of counsel for the petitioner, it is ordered that it be referred to , as referee, to examine and certify how the estate in the premises set forth in such petition is vested in the said ; and whether he is an infant and a trustee of the said premises, or any and what part thereof, within the intent and meaning of the 7th article of title 2, chapter 1, of the third part of the Revised Statutes of the State of New York. And it is further ordered, that notice to attend such referee be given to the guardian of said infant or some relative competent to protect his rights.

*No. 43 C, page 209.—Report.*

In the matter of J. D., an Infant Trustee.

To, etc.:

In pursuance of an order, etc., do report:

That by a deed of bargain and sale, dated the 1st of June, 1819, C. D., late of the city of New York, granted and conveyed to E. B. certain lots and parcels of land situated in , upon trust, to pay the same, and out of the proceeds of such sale to pay certain creditors therein named the sums due to them as specified, and upon the full payment of the same, either by a sale of parcels of such lands or by the said himself, to reconvey the remaining parcels or the whole premises to him, the said , his heirs or assigns.

* From an order entered in Chancery, Hoffman's Ch. Pr., vol. 3, p. 368, No. 308.

And I further report, that the said did in his lifetime sell and dispose of various parcels of the said real estate so conveyed to him, and did pay and discharge various of the debts provided for in such conveyance, and the said , the grantor, did also pay divers of such debts, so that there remained only the sum of $ of such debts due to one of all the debts provided for. And that since the death of the said such sum was fully discharged by the said .

That on or about the day of the said E. B. departed this life without leaving a will, and leaving J. D. his only child and heir-at-law.

That the said J. D. is an infant of the age of sixteen years and five months.

That the parcels of land remaining unsold, the seisin in which has descended upon such infant, are as follows: All that, etc.

And I report, that the said is an infant trustee of such premises within the meaning of the Act of Legislature of the State of New York in such case provided, and that such parcels of ground should be conveyed by him to the said .

All which is respectfully submitted.

Dated New York, .

*No. 44, page 216.—Order for Committee.*

In the matter of
A. B.,
a lunatic.

On reading and filing the inquisition in this matter taken, etc., before three commissioners appointed by this Court to execute a commission in nature of a writ *de lunatico inquirendo*, issued out of, and under the seal of this Court, whereby it appears that the said L. D. is of unsound mind, and not sufficient for the government of himself, etc., and that he was seised, etc., of certain estate; and on read-

ing and filing the petition of C. D., duly verified, praying that a committee, etc., be appointed. Now, on motion of Mr. H., counsellor for petitioner, ordered that it be referred to , residing in the City of New York, as sole referee, to inquire and certify who is or are the most fit and proper person or persons to be appointed committee of the person and estate of the said lunatic. And such referee is also to inquire and certify who is or are the heir-at-law, or next of kin of such lunatic, to whom due notice of attending such referee is to be given. And such referee is further to ascertain and certify the nature and amount of the property and estate, real or personal, of such lunatic, and the annual income thereof; and also the amount of the bond which ought to be given by the committee of the estate of such lunatic, for the faithful performance of the trust committed to him, and the sufficiency of the persons proposed as the sureties of such committee; and, further, such referee shall ascertain and certify when such lunacy commenced, and at what expense, and by whom, such lunatic hath hitherto been maintained; and what would be a proper allowance for the annual support and maintenance of such lunatic, regard being had to his circumstances and estate.

*No.* 45, *page* 216.—*Report upon Order.*

In the matter of
L. D.,
a lunatic.

To, etc.:

In pursuance of an order of this Court, made in the above matter, and dated the day of , I, the subscriber, the referee therein named, do report:

That I have been attended upon the reference had before me, by the attorney of the petitioner herein, and also by an attorney on the part of , the next of kin and heir-at-law of such lunatic; and having examined the matters referred to me, I report:

That J. D., of , is a fit and proper person to be appointed the committee of the person and estate of the said lunatic.

That the property of said lunatic consists of personal property as follows (enumerate it): of the value in the whole of the sum of $ , and yielding an income of about $ ; and of a house and a lot of ground in the , of the value of $ , the rents and profits of which are about the annual sum of $ . And I am of opinion that the bond to be given by such committee should be in the sum of $ , with two sureties. That the said J. D. has proposed as his sureties J. R. and S. B., each *of the City of New York*, to be his sureties; that I have taken the usual affidavit of justification from each of them, and report, that the bond of the said J. D., with the said J. R. and S. B. as his sureties, for the above-mentioned sum of $ , will be a sufficient security for the said lunatic.

That the lunacy of the said commenced, as appears from the inquisition taken, on or about the day of . That the above-named J. D. has supported such lunatic from the aforesaid time; and I am of opinion that he should be allowed the sum of $ for such support.

[At the rate of the future maintenance].

I further report that the sum of $ would be a proper annual allowance for the support and maintenance of the said lunatic.

*No. 46, page 220.—(A) Order upon Petition for Sale of Real Estate.*

In the matter of the lunacy of .

At, etc.:

Upon reading and filing the petition of , committee of the person and estate of , the above-named lunatic, praying authority to mortgage or sell the real estate of said lunatic; on motion of , attorney for the petitioner, it

is ordered that it be referred to , as sole referee to inquire into and report upon the matters contained in such petition, and whether a mortgage or sale, and which, if either, of the real estate of such lunatic, and what part thereof, if less than the whole, is necessary for the purposes stated in such petition, and the reason or grounds why any such sale or mortgage is necessary. And he shall ascertain who are interested in the real estate of such lunatic, or would be his heirs-at-law should he die intestate; and he shall give notice to such parties to attend before him.

(*B*)—*Report under Order of Sale for Debts.*

To, etc.:

In pursuance of an order of this Court made in this matter, and dated the day of , I, the subscriber, the referee therein named, do report:

That I ascertained that J. B. and R. B., both of the City of New York, would be the heirs-at-law of said lunatic if he were dead intestate; that I caused them to be summoned to attend before me, *and was attended on their behalf.*

That due proof was made to me of the amount and particulars of the personal estate of such lunatic, which I find to have consisted of (*state items of personalty*), and the value of the same was $ , and that out of the same the said committee has paid the sum of $ in discharge of a debt due for the support and maintenance of such lunatic, and also the sum of $ for the expenses of prosecuting the commission issued in this matter, leaving in the hands of such committee the sum of $ ; and that the whole value of the personal estate of such lunatic is at the present time the sum of $ .

I further report that due proof has been made to me of the following debts due and owing by such lunatic to the persons herein named, that is to say (*state creditors and amounts due*); that the whole amount of such debts is the sum of $ .

And I further report that in my opinion it would be most

advisable to sell that portion of the said lunatic's real estate which consists of the house and lot known as No. street, in the ward of the City of New York. That from the testimony taken by me it appears that the value thereof is about the sum of $ , which will pay and discharge all the debts of the said lunatic, and all costs of the proceedings, and leave a trifling balance, if any. That the said J. B. and R. B. have approved of the sale of such portions of the said real estate, as the most advisable mode of raising the amount of the said debts.

All which is respectfully submitted.

*No. 47, page 230.—Order to Compute Amount on Mortgage.* At, etc.:

It appearing by the affidavit of that this is an action for the foreclosure of a mortgage, and that no answer has been received, and the time allowed for such purpose has expired (or the right of the plaintiff, as stated in the complaint, being admitted by the answer), it is, on motion of , ordered that it be referred to , as referee, to compute the amount due to the plaintiff on the bond and mortgage mentioned in the complaint; and also the amount due to the defendant, J. M., stated in such complaint as a prior incumbrance of the mortgaged premises; and also to examine and report whether such mortgaged premises can be sold in parcels, if the whole amount secured by the mortgage has not become due.

*Clause where a Defendant is an Infant.*

And the defendant, J. R., being an infant, and having put in a general answer by his guardian, the said referee is also to take proof of the facts and circumstances stated in the complaint, and to examine the plaintiff or his agent on oath as to any payments which have been made, and to compute the amount due on the mortgage preparatory to the application for judgment.

[If any of the defendants are absentees, this clause is to be inserted.]

*No. 48, page 230.—Report upon such Order.*

To, etc.:

In pursuance of an order made in this cause, and dated the day of , I, the subscriber, the referee therein named, do report:

That I have computed the amount due for principal and interest upon the bond and mortgage mentioned by the plaintiff, and there is due thereon, at the date of this report, the sum of (being the whole of the principal secured and the interest in arrear thereon).

Schedule A hereto annexed, and making part of this report, contains a statement of the amount due for principal and interest respectively, the period of the computation of the interest and its rate.

[And I further report, that I have taken proof of the facts and circumstances stated in the plaintiff's complaint, and have examined the plaintiff, or C. L., the agent of the plaintiff, who has the possession of such bond and mortgage, and collected the interest thereon for three years past, as to any payments which have been made thereon. [In the case of a corporation in one case, the treasurer was examined.] And I report, that the several facts and matters stated in the complaint are true.

I further report, that as the whole of the amount secured by such mortgage is not due, but only the sum of $ , the first installment and the interest, being together the sum of $ , I have taken testimony as to the situation and value of the said mortgaged premises. That the same consist of three lots or parcels of land situate in the Ward of the city of New York, each of the value of about the sum of $ . That a sale of one of such lots will be sufficient to produce the amount due, and can be sold separately without injury to the parties.

*No. 49, page 231.—Judgment for Sale.*

At a Special Term of the Supreme Court, held at the City Hall, in the City of New York, the day of , 18 .

Present: , Esq., *Justice.*

On reading and filing the report of , referee herein, dated the day of , 18 , to whom it was referred to compute the amount due to the plaintiff for the principal and interest on the bond and mortgage set forth in the complaint (if any of the defendants are non-residents or infants, and to examine the plaintiff on oath as to payments, and to take proof of the facts and circumstances stated in the said complaint), by which report it appears that there was due to the plaintiff, at the date of the said report, for the said principal and interest, the sum of $ ; and on reading and filing the affidavit of , attorney for the plaintiff, showing the filing of the notice of the pendency and object of this action and the other matters required by the 72d rule of the Supreme Court and section 132 of the Code of Procedure, and on motion of Mr. , of counsel for the plaintiff, it is ordered that the said report be, and the same hereby is, in all things confirmed. And on like motion as aforesaid, it is adjudged that the mortgaged premises described in the complaint in this action as hereinafter set forth, or so much thereof as may be necessary, and as may be sold separately without prejudice to the interest of the owner thereof, be sold at auction (in the city and county of New York), by E. F., of etc., as referee for that purpose; that the said referee give public notice of the time and place of such sale, according to law and the practice of this Court; that any of the parties to this action may purchase at such sale; that the said referee execute to the purchaser or purchasers a deed or deeds of the premises sold; that out of the moneys arising from such sale, after deducting the amount of his fees and expenses on such sale, and

any lien or liens upon said premises so sold at the time of such sale for taxes or assessments, the said referee pay to the plaintiff or his attorney the sum of dollars and cents, adjudged to the plaintiff for costs and charges in this action, with interest from the date thereof allowed, and also the amount so reported due as aforesaid, together with the legal interest thereon, from the date of the said report, or so much thereof as the purchase-money of the mortgaged premises will pay of the same, take a receipt thereof, and file it with his report of sale; that he deposit the surplus money (if any) with the Treasurer of the County of (or, if the judgment be had in the City and county of New York, with the Chamberlain of the city of New York) to the credit of this action, to be drawn only on the order of the Court, signed by said Treasurer and a judge of the Court, within five days after he receives the same; that he make a report of such sale, and file it with the Clerk of this Court, with all convenient speed; that if the proceeds of such sale be insufficient to pay the amount so reported due to the plaintiff, with interest and costs, as aforesaid, the said referee specify the amount of such deficiency in his report of sale, and that the defendant, C. D., pay the same to the plaintiff; and that the purchaser or purchasers at such sale be let into possession on production of the referee's deed.

And it is further adjudged, that the defendants, and all persons claiming under them or any or either of them after filing of the aforesaid notice of pendency of this action, be forever barred and foreclosed of all right, title, interest, and equity of redemption in the said mortgaged premises so sold, or any part thereof.

The following is a description of the mortgaged premises hereinbefore mentioned, and to be sold under and by virtue of judgment, namely:

(*Insert description of mortgaged premises.*)

*No. 50, page 234.—Terms of Sale.*

Conditions of sale of the premises described in the annexed notice:

Ten per cent. of the purchase-money to be paid to the referee at the time of the sale; the residue to be paid at the referee's office, , on the day of , when the deed will be delivered.

The auctioneer's fee of dollars, for each parcel sold separately, to be paid by the purchaser.

The biddings will, at the option of the referee, be kept open until the ten per cent. is paid.

The property is sold free of incumbrances. All taxes and assessments are to be paid out of the purchase-money, provided bills thereof are furnished to the referee before the completion of the sale.

The purchaser will be charged with interest on the whole amount of his bid, if payment in full is not made on the day fixed for the delivery of the deed.

H. W., *Referee.*

[*Copy of the Advertisement to be Annexed.*]

I acknowledge that I have become the purchaser of the above-described premises upon the foregoing conditions, for the sum of , and I do agree to conform to such conditions of sale, having paid the ten per cent. required.

*50 A.—Order to inquire into the Title.*

At, etc.:

On reading and filing an affidavit of J. M., setting forth that on the day of he became a bidder at a sale of the premises ordered to be sold herein for the sum of $ , and that such premises were struck down to him as the highest bidder; that he signed thereupon certain terms of sale, and paid to , the referee in this cause, a deposit, the sum of $ , being ten per cent. on the sum bid. That upon examination, a good title to such premises, as he is informed and believes, can not be

made, and asking that he be discharged from such contract of sale, and his said deposit be returned.

And on reading notice of this motion (or order to show cause), and hearing Mr. in support of, and Mr. in opposition, it is ordered that it be referred to , as sole referee, to examine and report whether a good title can be made to such premises, and whether such title could have been made on the day of such sale, or at the present time, or by any and what instruments or proceedings, if valid objections exist to the same.

*No.* 51, *page* 244.—*Deed of Referee.*

This indenture, made this day of between H. N., a referee appointed by an order of the Court of the first part, and of of the second part.—*Whereas*, by a judgment or order of this Court, dated the day of , made in a cause wherein J. M. was plaintiff and C. K. and others defendants, it was, among other things, ordered and adjudged that the mortgaged premises mentioned in the complaint, and hereafter particularly described, or so much thereof as might be sufficient to raise the amount due to the plaintiff for principal, interest, and costs in this action, and which might be sold separately without material injury to the parties interested, be sold at public auction, according to the practice of this Court, by or under the direction of the above-named referee; that such sale be made in the county in which such mortgaged premises, or the greater part thereof, were situated; that the said referee give public notice of the time and place of such sale, according to the course and practice of the Court, and that any of the parties in such action might become a purchaser or purchasers on such sale; that the referee execute to the purchaser or purchasers, at such sale, good and sufficient deed or deeds for such mortgaged premises or such parts thereof as shall be sold. *And whereas*, the said referee, in pursuance of such order and judgment of the Court,

did, on the day of , sell, at public auction, at , the premises in the said order of judgment mentioned (*that portion of the said mortgaged premises hereinafter described*), due notice having been first given of the time and place of such sale agreeably to the said order, at which sale the premises hereinafter described were struck off to the said party of the second part for the sum of , that being the highest sum bidden for the same.

Now this indenture witnesseth, that the said referee, the party of the first part to these presents, in order to carry into effect the sale so made by him as aforesaid, in pursuance of the order and judgment of the said court, and in conformity to the statute in such case made and provided, and in consideration of the premises, and of the said sum of dollars, paid by the said part of the second part to these presents, to the said referee as aforesaid, the receipt whereof is hereby acknowledged, hath bargained and sold, and by these presents doth grant and convey, unto the said part of the second part, and to heirs and assigns, forever, all , together with all and singular the hereditaments and appurtenances to the same belonging or in anywise appertaining. To have and to hold the said premises hereby conveyed, or intended so to be, unto the said party of the second part, his heirs and assigns, to his and their only proper use, benefit, and behoof, forever.

In witness whereof, etc.

Dated, etc.

*No. 52, page 244.—Report of Sale.*

To, etc.

In pursuance of a judgment of this Court made in the above cause, and dated the day of , by which [it is usual to recite the order, but it is needless], etc., I, the subscriber, the referee therein named, do report:

That all and singular the mortgaged premises mentioned in such judgments were sold by me, and under my direction,

at the , on the . That previous to such sale I caused public notice of time and place thereof to be given by advertisement published in [the mode directed]; which notice contained a brief description of such mortgaged premises.

And I further report that on the said day of , at , such premises were put up for sale in my presence and under my direction, and were then and there struck off to , he being the highest bidder, and that being the highest sum bid for the same.

That I have executed and delivered to the said , the purchaser aforesaid, a deed for such premises; and that I have paid and disposed of the purchase money received by me, as follows, to wit:

That I have retained the sum of $ , being the amount of my fees, commissions, and disbursements on such sale, as will appear by the statement thereof hereto annexed.

That I have paid to the attorney of the plaintiff the sum of $ , the amount of his costs as adjusted, and have taken his receipt therefor, which is annexed.

That I have paid to the attorney of the plaintiff (or to the plaintiff) the sum of $ , being the proper amount due to such plaintiff for principal, interest, upon the judgment in this action, and have taken his receipt therefor, which is annexed.

And I have paid the balance of such proceeds, being the sum of $ , to the Treasurer of the County (or to the Chamberlain of the City of New York), and taken his receipt therefor.

[If there is a deficiency, the report, after stating the payment of the surplus proceeds, should state the amount of such deficiency due from the defendant to the plaintiff.]

[The receipts should be annexed, and a statement of the referee's disbursements and fees.]

*No. 53, page 250.—Order as to Surplus.*

At, etc.:

The report of the referee (or of the sheriff), having

been filed and confirmed, by which it appears that there is a suplus in the hands of the Treasurer of the County (Chamberlain, etc.) arising from the sale of the mortgaged premises, had herein. On reading and filing a notice of a claim by J. D. to such surplus, or a part thereof, by reason of a judgment in his favor against the defendant C. M., on motion of , it is ordered that it be referred to M. H., of, etc., counsellor-at-law, as sole referee, to ascertain and report the amount due, if any, to the said J. D., or to any other person, which is a lien upon such surplus money, and the priorities of the several liens thereon.

And it is further ordered that such referee summon before him, on such reference, every party who has appeared in this action, and every person who has delivered written notice of his claim to such surplus moneys, and cause them to have notice of all his proceedings under this order; and that he make report to this Court, with the proofs, if required by any party.

*No. 54, page 250.—Report as to Surplus.*

To, etc.:

In pursuance of an order of this Court made in this cause, and dated the day of , I, the subscriber, the referee therein named, do report:

That a certificate of the Treasurer of , (or the Chamberlain of New York) has been laid before me showing that there was in his hands on the day of , to the credit of this cause, the sum of $ , being the amount deposited as the surplus of the sale of the premises, less the commissions of such Treasurer.

A certificate of the clerk of this Court was also laid before me stating what defendants had appeared in the case, viz.: the defendant, C. K., etc., and also that the claims upon such surplus (or some part thereof), filed with him, were on behalf of J. D., L. K., etc.

That I caused notice to be given to all the above-named defendants and claimants, of the time and place for proceed-

ing in the execution of such order, and have received proof of the due service of such notice.

That I have been attended upon such reference on behalf of the defendants A. C., etc., and of the claimants J. D., etc., and I find and report:

That the surplus of such moneys, after deducting the costs of this reference, be paid and applied as follows, to wit:

1. To the said A. C., on account of a mortgage dated the day of , upon such premises (or part of such premises), the sum of $ , the principal and interest due thereon.

2. To the claimant S. B. the sum of $ , for principal and interest upon judgment secured by him against the said , and dated the day of .

[And that the residue of such surplus moneys be paid to the said defendant , the mortgagor of such premises. (7 Paige, 129).

All which, etc.

*No. 55 A, page 254.—Forms in Redemption Suits. Order of Reference.*

At, etc.:

This cause coming on for trial on the complaint and the answer of C. M., and it appearing that the action is brought for the purpose of redeeming certain premises in the complaint described from the lien and incumbrance of a certain mortgage therein set forth, and the plaintiff appearing to be entitled thereto, and an account being necessary before judgment can be had thereon, on motion of , and hearing of , it is ordered that it be referred to , as sole referee, to take an account of what is due to the defendants for principal and interest upon the bond and mortgage mentioned in the complaint. And also an account of the rents and profits of such mortgaged premises which have come to the hands of the said defendants, or of any person or persons for his use or by his order, or which such defend-

ant might, without his willful default, have received (or, *with ordinary care and diligence, might have received.*) And in case such referee shall find that the said defendant has been in the actual possession of such premises, or any part of the same, then he is to set an occupation rent for the time of such possession; and he is to make to such defendant all just allowances, and especially for all necessary repairs and lasting improvements which have been put by him upon such premises, and to allow interest upon the sums properly expended. And what shall be coming on account of such rents and profits shall be deducted from what shall be found due for principal and interest, as aforesaid.* [*Clause for the production of books, etc., and the examination of parties.*]

[And such referee shall also ascertain and report whether the said , or any one under him, has committed or suffered any waste or injury to such premises, and the amount or value of the same.]

[In the English Precedents, and in that copied in Hoffman's Chancery Practice (vol. 3, page 271), the decree proceeds to direct payment of the amount at a certain day after the confirmation, a reconveyance, delivery of deeds, etc. And, in default of the complainant's paying the amount, that the bill stand dismissed out of court with costs.

We apprehend that the better and more regular practice with us would be to limit the order of reference to exactly what the referee is called upon to examine into; and upon his report to found the judgment with such provisions.]

*No. 55 B.—Forms in Redemption Suit.—Report.*

To, etc.:

In pursuance of an order of this Court made in the above cause, and dated the day of , I, the subscriber, the referee therein named, do report:

That I have been attended on behalf of the parties to this

* Taken and modeled from the case of R. R. R. *vs.* J. M. V., January, 1821, confirmed by Chancellor Kent.

action, and have heard their allegations, and taken testimony upon the matters referred, and I report:

That I have taken an account of the amount due upon the bond and mortgage mentioned in such order, and also of the rents and profits of the premises received by the defendant W. G. D., or which, with ordinary care and diligence might have been received by him, the particulars and items of which accounts appear in schedules A and B hereto annexed, and making part of this report.

That in computing the amount due on such bond and mortgage I have stopped the allowance of interest on the 11th of , the day of the tender made the plaintiff to the said W. G. D. of the amount then due, considering that such tender was strictly made; and the defendant had no just ground for refusing such redemption.

That I have considered, upon the testimony laid before me, that the sum of $ is a fair and just rent with which the defendant, , should be charged, that being the amount actually received from a tenant, and no sufficient ground for an increased rate to be charged being established.

And as to such part of the order as directs an account of any waste or injury to the premises, or the value thereof, by the said W. G. D., or those under him, I report—

That I have taken the rule to be that a mortgagee in possession is only chargeable for waste, technically so-called, or willful neglect producing an injury or deterioration of the premises, but is not liable for any diminution of value which may be accounted for by lapse of time. And I find that the premises were, at the time the said W. G. D. took possession, in about the same condition, as to fences and buildings, as at the present time.

[Facts were then stated, as to the cutting of timber, to warrant the conclusion that there was no ground for charging the defendants with anything for the cutting of the wood, nor for any improper use or undue exhaustion of the farm.]

And as to such part of the decree as directs an account of the value of the beneficial and permanent improvements which the said W. G. D. has caused to be made upon such premises, I report:

That I have taken the rule of the Court to be that additional permanent improvements, made by a mortgagee in possession, shall be paid for according to their value at the time of redelivery of possession, but that he shall be allowed the actual cost of repairs necessary for preserving the premises in the same condition, or producing the rent charged to the mortgagee.

[These views were then applied to the evidence as to the erection of a piece of stone wall, then sunken and out of repair, but the cost of which was allowed.]

And I further report, that I have considered the defendant, W. G. D., previous to the 1st day of April, 1811, as a creditor by virtue of the bond and mortgage and by his disbursements, receiving partial payments upon his claim by means of the rents and profits; (interest on such bond and mortgage being stopped before the commencement of the reception of such rents, such rents and profits are applied to the extinction of such disbursements and of the principal of such bond and mortgage).

And I find that on the 1st day of April, 1811, the amount of the rents received had fully paid and discharged the whole sum in any manner due to the said W. G. D. on such bond and mortgage, and for all the allowances made by me to him. That from that time I have considered him as a naked trustee, receiving and retaining moneys in his hands on account of the complainant, and chargeable with interest, and to be credited with necessary payments made by him. And I have stated the residue of the account with annual rests, showing the amount of principal annually due, and in a separate column the amount of interest thereupon. The total amount of such balances is the sum of $627 of principal and $222 of interest, making the amount due from the said defendant the sum of $849, for which judgment should be had.

[If interest continues as usual upon the bond and mortgage, the account should be taken (the rents exceeding the interest and expenses) by annually applying them so as to reduce the principal.]

*No. 55 C.—Final Judgment.*

At, etc.:

This action being brought on for judgment upon the report of the referee made therein, and dated the day of , and such report having been duly confirmed (or being brought on upon the exceptions taken thereto, and for judgment thereon); and it appearing from such report that upon the account taken by such referee under an order of reference heretofore made, there was due from the plaintiff to the defendant, G. D., at the date of such report, the sum of $ for principal and interest on the bond and mortgage mentioned in the pleadings, after making all just allowances. Now, on hearing of , etc., it is ordered and adjudged (that the exceptions taken to such report be and the same are hereby overruled, and) that the said plaintiff do pay unto the said defendant the said sum of $ , with interest from the date of said report, together with his costs, to be adjudged within , after service of a copy of this judgment and of the bill of costs as adjusted; and thereupon that such defendant do reconvey the said premises to the plaintiff, by a proper deed, to be approved of by the said referee, if not agreed upon; and do let such plaintiff into possession of *the said* premises, and do deliver up all deeds and writings in his custody or power relating to such mortgaged premises. And in default of the said plaintiff paying to the said defendant the amount so referred due and hereby adjudged to be paid, with the interest and costs as herein directed, it is ordered and adjudged that this action, and the complaint therein, do stand dismissed out of this Court, with the costs to be adjusted.

[The practice in one case was followed, where the plaintiff did not redeem, of making an affidavit of service of the decree

and bill of costs as taxed, of the expiration of the time allowed, and the default. Upon this, an order was obtained for the final dismissal of the bill, with costs, to be taxed. (Hoffman's Ch. Pr., 3, p. 272.)

*No. 56 A, page 259.—Decree Strict Foreclosure.*

Wilkes
*vs.*
Wells.

Nov., 1834.

At, etc.:

This cause coming on to be heard upon the bill of complaint, and the answer of the above-named defendant, an alleged lunatic, by Seth P. Staples, his guardian *ad litem*, and counsel for the parties being heard, it is ordered, adjudged, and decreed, and this Court doth order, etc., that it be referred to D. C., one of the masters of this Court (to ; a referee), to compute and ascertain what is due to the complainant for principal and interest upon the amount paid for taxes and assessments upon the premises mentioned in the complaint out of the sum of nine hundred and eighty dollars ($980), the purchase-money of such premises given and advanced by the complainant at the master's sale, set forth in such bill; and also to compute and ascertain the amount due for principal and interest upon the bond and mortgage mentioned in such bill, bearing date the 23d of May, 1829.

And such master is also to take an account of the rents and profits of such premises received by the complainant or by any person to his use; and what shall appear to be the balance of such rents and profits shall be deducted out of the sum which the master shall find due for principal and interest aforesaid.

And it is further ordered, that the complainant's costs be taxed, and added to the sum which shall be found due as aforesaid.

And upon the defendant paying to the complainant the

amount which shall be found due for principal, interest, and costs as aforesaid, within six months after service of a copy of such report duly confirmed, and a copy of this decree upon the said Seth P. Staples, the guardian *ad litem* as aforesaid, then that such complainant do execute and deliver a proper instrument of conveyance of the said premises to such defendant, to be approved of by the said master, in case the parties differ respecting the same, and do cancel and satisfy of record such mortgage, if thereto required. But in default of such defendant, or some one on his behalf, paying to the complainant or his solicitor what shall be so reported due for principal, interests and cost within the period aforesaid, then it is ordered, adjudged, and decreed that such defendant do stand absolutely debarred and foreclosed of and from all equity of redemption in and to the said premises included in such mortgage, and described as follows, to wit:

*No. 56 B.—Final Order in Strict Foreclosure.*

W.
*vs.*
W.

At, etc.

It appearing to this Court that a decree was made in this cause on the 24th of Nov., 1834, whereby it was referred to *D. C.*, a master, etc., [reciting the decree].

And it further appearing that such master made his report in the premises on the 15th of January, 1835, whereby he certified that there was due to the above-named complainant the sum of $1,311.09 for principal, interest, and costs upon and by virtue of the said mortgage; which report was by an order of this Court, dated the day of , duly confirmed; and it also appearing from the affidavit of H. W. L., now filed, that certified copies of said report, and of the order confirming the same, and of the said entitled order, were served personally upon the said Seth P. S., guardian as aforesaid, on the 13th day of February, 1835; and it also

appearing by the affidavit of such complainant, now filed, that he has not been paid such amount, or any part thereof. *Thereupon*, on motion of *M. Hoffman*, counsel for such complainant, it is ordered and decreed that the said T. W. be and do stand absolutely debarred and foreclosed of and from all right, title, interest, equity, and benefit of redemption of, in, and to the said mortgaged premises, as the same are described in the said deed of the 24th of November, 1834.

*No. 57, page 277.—Affidavit in Partition Suit.*

, being duly sworn, deposeth and saith, that he is the attorney of the plaintiff in the above entitled action; that the same is brought for the partition of lands situated in the County of , held in common by the parties to this action; that , one of the defendants, is an infant under the age of years (or an absentee, or is unknown); that the defendants C. K. and J. D. have appeared, and by answer admitted (or, have not denied or controverted any of) the allegations of the complaint, as to the rights and interests of the several parties in the premises of which partition is sought.

Sworn, etc.

[Notice of the motion is to be given to all who have appeared.]

[The affidavit may be required as to other particulars, as will be seen in the following order, which embraces, probably, all the points which can be included in the inquiry before a referee.]

*No. 58, page 277.—Order of Reference in Partition.*

R. O. M.,
*agst.*
S. I. D. and others.

At a Special Term of the Supreme Court, held, etc., Nov. 17, 1868.

It appearing from the (amended) complaint in this action that the same is brought for a partition of the lands and

tenements mentioned therein, among the parties named as tenants in common thereof; and the several rights, interests, and estates of the parties as stated in such a complaint not having been denied or controverted by any of the defendants; and three of such defendants being infants under the age of twenty-one years; and it being alleged by affidavit that said lands and premises are so circumstanced that a partition thereof cannot be made without great prejudice to the owners thereof, due regard being had to the power of the Court to decree compensation to be made for equality of partition, and to the ability of the respective parties to pay a reasonable compensation to produce such equality—on motion of R. W. T., the plaintiff's counsel, it is ordered that it be referred to D. H., Esquire, counsellor-at-law, of the City of New York, as referee, to take proof of the plaintiff's title to, and interest in, the lands and premises described in the (*amended*) complaint in this action, and to ascertain the rights and interests of the several parties to this action therein, and an abstract of the conveyances and instruments by which the same are held; and also to inquire and report whether the whole premises, or any lot or separate parcel thereof, are so circumstanced that an actual partition can not be made; and if he concludes that a sale of the whole premises, or any lot or separate parcel thereof, will be necessary, that he specify the same in his report, together with the reasons which render a sale necessary; and in each case that he also ascertain and report whether any creditor, not a party to the suit, has a specific lien by mortgage, devise, or otherwise, upon the undivided share or interest of any of the parties in that portion of the premises which it is necessary to sell; and if he finds that there is no such specific lien in favor of any person not a party to the suit, that he further inquire and report whether the undivided share or interest of any of the parties in the premises is subject to any general lien or incumbrance, by judgment or decree; and that he ascertain the amount due to any party to the suit who has either a general or specific

lien on the premises to be sold, or any part thereof; and the amount due to any creditor, not a party, who has a general lien upon any undivided share or interest therein, by judgment or decree, and who shall appear and establish his claim on such reference.

And that, if required by the parties who appear before him on such reference, he ascertain and report the amount due to any creditor not a party to the suit, which is either a specific or general incumbrance upon all the shares or interests of the parties in the premises to be sold, and which would remain as an incumbrance thereon in the hands of the purchaser.

*No.* 59, *page* 280.—*Report in Partition.*

To, etc.:

In pursuance of an order of this Court made in the cause, and dated the 17th of March, 1868, whereby, etc. (the preceding order was recited), I, D. H., the referee named in such order, do report:

That I have been attended by the attorneys of the several parties who have appeared in this action, and by the guardian *ad litem* of the infant defendants, and have taken proofs of the facts and circumstances stated in the complaint.

And I find that such facts and circumstances are true as therein stated.

And I further report that the following is an abstract of the conveyances and instruments by which the premises described in the complaint are held, that is to say:

| | |
|---|---|
| E. Jackson and wife to Jacob S. Moses. | Deed dated Jan. 25, 1853. Recorded Feb. 19, 1853, Lib. 626, 565. |

[The statement, in a similar form, followed of the various deeds which vested the whole of the premises, consisting of various parcels, in Jacob S. M.] The report proceeded.

Jacob S. M. being thus the common source of title, died seised of the premises comprised in the complaint, leaving a last will and testament set forth in such complaint, by which he gave to his wife (the defendant, Sarah S. D.), upon her relinquishing all claim of dower, the sum of $10,000; and by a codicil to such will gave her the use and income of the house No. 419 Fourth street, in the City of
for her natural life.

Such will contained no other clause or provision as to real estate of the testator, and was duly proven and recorded in the office of the Surrogate of the City and County of New York, the 30th day of January, 1855.

That the said J. S. M., departed this life on the 10th of December, 1854, leaving his widow, now the defendant, Sarah S. D., and six children, his heirs-at-law, viz.: The plaintiff, R. O. M., the defendants Montfiore M., Moultrie M., Flora M., Felix I. M., and J. M.

That the said Sarah S. D., the widow, has accepted such sum of $10,000, and has duly released all her right of dower in the property.

And I further report that the legal estates and interests of the parties in the premises are as follows:

The plaintiff, R. O. M., is entitled to one undivided sixth part, subject as to the Fourth street house and lot to the life estate of the defendant, Sarah S. D.

The defendant, M. M., is entitled to one undivided sixth part, subject as to the Fourth street house and lot to the life estate of the defendant, S. S. D., and as to all the other property, except such Fourth street house, to the inchoate right of dower of his wife, R. J. M.

[A similar clause as to Moultrie M. and his wife.]

That the infant defendants, Flora, Felix I., and Jacob are each entitled to one undivided sixth part of such premises, subject as to the Fourth street house and lot to the life estate of the defendant, S. S. D., therein.

The said defendant, S. S. D., is entitled to an estate for her natural life in the said house and lot in Fourth street.

And I further report, that the premises described in the complaint in this action are so circumstanced that in my opinion a partition thereof can not be made without great injury and prejudice to the owners thereof. The said premises are largely incumbered with taxes and assessments and sales therefor, and the parties in interest have no funds to pay the same, as they would have to do if an actual partition was made. There are fourteen different city lots, of varying value, to be divided among six owners, who are shown to have no means to make equality of partition without dividing up one or more of the city lots in such a way as, by reducing its dimensions, to greatly lessen the value of the same, could an actual partition be made.

The life estate of the defendant, S. S. D., in the house and lot in Fourth street would also very much embarrass the making an actual partition.

These facts, with the number of the owners and persons interested, render an actual partition of great difficulty and injurious to the interests of the parties.

And I further report that I have made inquiry, taken proof, and caused searches to be made, and I find two creditors not parties to this action, and no more, having any specific lien, by mortgage, devise, or otherwise, upon the undivided share or interest of any of the parties in the premises. Such creditors are—

T. C. C., by judgment against R. O. M., docketed for $1,135.29 in the Clerk's office of the City and County of New York, on the 8th of November, 1866.

Judgment in favor of J. E. J., for $183.43, docketed against R. O. M., in the Clerk's office, etc., the day of 1868.

That there is no other general lien or incumbrance, by judgment or decree, upon the undivided share or interest of any of the parties to this action.

And I further report the no creditor, not a party to this action, having any general lien on any undivided share or interest in the premises, by judgment or decree, appeared

before me on this reference to establish his claim, except as aforesaid.

Annexed is the testimony taken before me, except such as is documentary, and also the search made by me herein.

All which, etc.

[The testimony taken related to the ages, marriages, time of death, etc., of various parties, and particularly the value of the various lots and parcels of ground in the complaint set forth. The searches in the usual offices were also annexed. Two mortgages of small amounts on the plaintiff's share were returned.]

*No. 60, page 281.—Final Judgment on Report.*

At a Special Term, etc., December 31, 1868.

On reading the complaint and amended complaint in this action, and due proof by affidavit of personal service in the city of New York of the summons and complaint more than twenty days before the order of reference was made in this action, on all the defendants, except the defendants Rose J. M., Penima M., and Rachel M.; and on reading and filing notices of appearance for said last-named defendants by W. and J., attorneys of this Court, and an affidavit showing that more than twenty days had elapsed since said service was made, and that no answer has been put in by any of the defendants in this action, or received by the plaintiff's attorney, except the general answer of the infant defendants, F. M., F. I. M., and J. M.; and on reading and filing the answers of said infant defendants; and also the report of D. H., to whom it was referred to take proof of the facts set forth in the complaint, and other matters, dated the
day of .

And on reading and filing a written admission of service of a notice of hearing and of application for judgment, signed by the attorneys of all the defendants who have appeared in this action.

And after hearing R. M. J., of counsel for the plaintiff,

and, etc.—Now, on motion of the said R. M. J., it is ordered and adjudged that the report of the referee be, and the same is in all things, confirmed.

And it is further adjudged, that the rights and interests of the several parties, subject to the incumbrances thereon, are as follows:

That the plaintiff and the defendants, M. M., Moultrie M., Flora M., F. I. M., and J. M., are each seised in fee-simple of an equal undivided sixth part thereof, subject to the incumbrances by reason of taxes and assessments and the legacies given in the will mentioned; and their respective estates in the house and lot situate in Fourth street, in the city of New York, are subject to an estate for life in the defendant S. S. D. That the estate and interest of the said Mont. M. and the said Moultrie M. are respectively subject to the inchoate right of dower of their respective wives therein.

And it is further adjudged, that all such lands and premises be sold at public auction, at the Exchange Salesroom, No. 111 Broadway, in the city of New York, on six weeks' public notice, by D. H., of the said city, counselor-at-law, who is hereby appointed referee for the purpose of such sale, and all matters relating thereto. That such referee give six weeks' public notice of the time and place of such sale, according to law, and the rules and practice of this Court; that after his report of such sales shall be confirmed by this Court, he execute and deliver to the purchaser or purchasers proper conveyances. That out of the proceeds of such sales, after deducting the costs and expenses thereof, and the costs and expenses of the said referee, on the first reference to him, he pay to R. W. T., the plaintiff's attorney, the sum of $240, the costs and disbursements of this action, as adjusted by the Clerk, to, etc. (the costs of the attorneys of other parties), and any allowances which may be made by this Court, with the costs of the guardian *ad litem* of the infant defendants. The said costs to be paid with interest from this date.

That out of the residue of the proceeds of such sales the

referee redeem said premises from any sales thereof for taxes or assessments, and that he pay all taxes and assessments thereon, and also the taxes and assessments on the property in Fourth street, and redeem the same from any sale thereof for taxes or assessments, out of the proceeds of sale of such premises in Fourth street.

[Directions were then given for the payment of various legacies out of the proceeds of the property other than the Fourth street, a sum to be invested to secure payment of an annuity bequeathed.]

Then it directed one-sixth of the residue of the proceeds (other than those of the Fourth street lot) less the liens by judgment or mortgages to be paid to the plaintiff; one-sixth in like manner to the defendants M. M. and Moultrie M. The remaining three-sixths to be paid to the Chamberlain of the city of New York within twenty days from the receipt thereof, and said Chamberlain is directed to invest each of such three-sixths separately for the benefit of each of such infant defendants on bond and mortgage, and during the minority of such infants to pay the income to the general guardian of each of them, and the principal to such child on the arrival at the age of twenty-one years.

[The proceeds of the Fourth street lot, after deducting taxes and assessments, were to be paid to the Chamberlain, to be invested on bond and mortgage, and the interest to be paid to the widow, S. S. D., during her natural life. Upon her death, the one-sixth to be paid to the plaintiff and to the defendants then of age, and to any one of them then an infant, upon coming of age.

Any one of the parties to the action might become a purchaser in such sale.]

And it is further adjudged, that the conveyances so directed to be given shall vest in the grantee or grantees therein a perfect title in fee to the premises described therein, as against any and all parties to this action, and all persons claiming or to claim by, through, or under them, or any of them.

And it is further adjudged, that in case the said Rose J. M. or P. N. M. shall refuse or omit to release to her husband her inchoate right of dower in the portion of the premises of which he is seised as aforesaid, then such referee shall ascertain and settle the proportional value of such inchoate right of dower, according to the principles of annuities and survivorship, and that he deduct the amount or value from the share of the proceeds aforesaid herein directed to be paid to her husband, and pay such amount to the said Chamberlain, and that the Chamberlain invest such amount in bond and mortgage, and accumulate the interest and income thereof, until his or her death; and that, on the death of either husband or wife, the said Chamberlain pay such sum, with the accumulations, to the survivor.

*No.* 61, *page* 284.—*Report of Sale.*

To, etc.:

In pursuance of, etc.

Advertisement and sale stated. Then—

That I have executed and delivered to the purchaser of premises directed to be sold, a deed for the same, and have received from him the sum of $ , the purchase money for such premises.

[Then follows a statement of the appropriation of the proceeds as directed in the judgment; the computation and payment of the dower interests, if the doweress accepted a sum in gross to extinguish it; and, there being infants, payment of their shares into the hands of the County Treasurer or Chamberlain.

*No.* 62, *page* 285.—*Deed of Referee.*

This indenture made, etc., between , referee in the action hereafter mentioned, of the first part, and of the second part.

*Whereas*, at a Special Term of the Court, held at , on the , it was, among other things,

ordered, adjudged, and decreed in a certain action then pending in such Court between (*parties*). That all and singular the premises mentioned in the complaint in said action, and hereinafter described, be sold at public auction, according to the course and practice of said Court, by or under the direction of the said , who was appointed a referee in said action, and to whom it was referred by the said order and judgment of the said Court, among other things, to make such sale; that the said sale be made in the county where the said premises, or the greater part thereof, are situated; that the referee give public notice of the time and place of such sale, according to law and the rules and practice of said Court, and that any of the parties in said action might become a purchaser or purchasers on such sale; that the said referee, after said sale, make report thereof to said Court, and after his report of sale shall have been duly confirmed, then that he execute to the purchaser or purchasers of said premises, or such part or parts thereof as should be so sold, a good and sufficient deed or deeds of conveyance for the same.

*And whereas*, the said referee, in pursuance of the order and judgment of the said Court, did, on the day of , one thousand eight hundred and seventy- , sell, at public auction, at , the premises in the said order and judgment mentioned, due notice of the time and place of such sale being first given, agreeably to the said order; at which sale the premises hereinafter described were struck off to the said part of the second part, for the sum of dollars, that being the highest sum bidden for the same.

*Now this indenture witnesseth*, that the said referee, the party of the first part of these presents, in order to carry into effect the sale so made by him as aforesaid, in pursuance of the order and judgment of the said Court, and in conformity to the statute in such case made and provided, and also in consideration of the premises, and of the said sum of money so bidden, as aforesaid, being first duly paid by the said

part of the second part, the receipt whereof is hereby acknowledged, hath bargained and sold, and by these presents doth grant and convey unto the said part of the second part all, etc., to have and to hold all and singular the premises there described, with the appurtenances hereby conveyed, or intended so to be, unto the said , his heirs, and assigns, to his and their proper use, benefit, and behoof forever.

In witness whereof, etc.

*No.* 63, *page* 288.—*Clauses Respecting a Doweress.*

And the defendant J. D., widow of M. D., deceased, by her counsel, declining to accept a sum in gross in lieu of her dower-right and estate in and to the one equal fifth part of such premises—it is thereupon ordered and decreed that such referee do ascertain and report the amount of the one-third part of one-fifth part of the proceeds of such premises, after deducting all expenses, to be invested for the benefit of the said J. D. That such referee do pay such sum into the hands of the Treasurer of the county of (in New York, City Chamberlain), to be by him invested and the interest thereof to be paid to the said J. D. during her natural life.

And the said defendant J. D., widow of M. D., deceased, having consented to accept in lieu of her right and estate of dower, in the one-fifth of such premises, such sum in gross as shall be deemed a reasonable satisfaction for such right, which consent has been proven by an instrument under seal executed by her and acknowledged so as to entitle the same to be recorded, and now filed with the Clerk of this Court; thereupon it is ordered and adjudged that the referee do ascertain what sum in gross of the proceeds of such sale, after deducting all expenses, will be, upon the principles of life annuities, a reasonable satisfaction for such estate, or right of dower in the one-fifth part of such premises; and

such referee shall pay over to the said J. D., widow as aforesaid, the amount so ascertained.

*Clause Respecting Inchoate Dower.*

And it appearing that the defendant S. J., wife of the defendant H. J., is an infant under the age of twenty-one years, and is entitled to an inchoate right of dower in the one-seventh part of such premises, it is ordered, that the said referee ascertain, upon the principles of annuities, what is the probable value of her contingent right of dower, that such amount may be deducted from the seventh part of the proceeds of such sale, after deducting the proper proportion of the costs and expenses to be borne by such seventh part, to be paid into the hands of the County Treasurer (in New York, City Chamberlain), to be by him invested in bond and mortgages or stock of the United States; the interest thereof to be paid to the said H. J., and the principal to the said S. J., in case she survives her said husband H. J.; otherwise to him.

[In 7th Paige's Reports, 400, the Chancellor refers to McKeans & Henry's Tables. (See Mathews' Practical Guide to Executors' Law Library, vol. ix., p. 137–138.) These will, with a little calculation, serve the purpose.]

*No. 64, page 298.—Consent to Refer Claim.*

In the matter of the claim of A. J.

A claim of the above-named, A. J., having been presented to , executor of J. L., deceased, upon a promissory note, dated the day of , alleged to have been made by the said J. L. for the sum of $ in favor of, and delivered to, the said A. J.; and the justice of such claim being disputed, we hereby agree that the matter of

such claim be referred to to hear, determine, and report upon the same.

(Signed)

Dated

I approve of the above agreement to refer, and of the referee therein named.

Dated *Surrogate of* .

[The nature of the claim should be set forth in the consent (13 Wendell, 453). The signing by the attorney suffices (35 How., 155).]

*No.* 65, *page* 290.—*Rule upon Consent.*

SUPREME COURT.

In the matter of the claim of A. J.

Upon filing the written agreement between A. J., a claimant against the estate of J. L., deceased, and M. C., executor of such estate, with the approval of , surrogate of the county of , thereto; and on motion of , it is ordered, that it be referred to named therein, to hear, determine, and report upon such claim, pursuant to the statute in such case provided.

*No.* 66, *page* 293.—*Report upon Claim.*

SUPREME COURT.

In the matter of the claim of A. J.

*against*

the estate of J. L., deceased.

In pursuance of a rule of Court, made in the above matter, on the day of I, the referee therein

appointed, having heard and examined, on oath, the several witnesses produced, do determine and report:

That there is due to the above-named A. J., from the estate of the said J. L., deceased, and from , as executor of such estate, the sum of dollars, over and above disbursements and costs.

All of which is respectfully submitted.

Dated

*No. 67, page 295.—Order on Creditors' Suit—One on Behalf of, etc.*

At, etc.:

This action being brought by the plaintiff on behalf of himself and all others, creditors (legatees) of , deceased, who shall come in and contribute to the cost of the same; and being at issue upon the answer of , the executor of , deceased, on motion of , of counsel for the plaintiff, and hearing Mr. , of counsel for the defendant, it is ordered, that it be referred to , as sole referee, to take an account of the testator's personal estate come to the hands of the said executor, or to the hands of any person or persons to his use or by his order; and also to take an account of what is due to the plaintiff and all other the creditors of the said , and of his personal and testamentary expenses. And the said referee is to cause advertisements to be made for such creditors to come in and prove their demands before him by a day to be fixed for such purpose, which advertisements are to be published once in each week, for at least three weeks,* in the State paper, and in a newspaper printed in the county of , where such demands are to be exhibited. And such referee is to fix a peremptory day for that purpose. And such of the said creditors as shall not come in and prove their demands by the day so limited

* 2 R. S., 183, § 112, 106. Or as much longer as the Court may direct.

shall be excluded from the benefit of this judgment or decree.

[But, before such persons shall be admitted to prove their demands, they shall contribute to the plaintiff their share of the expenses of the action.*]

And for the better taking such account, the referee shall be at liberty to examine the several parties upon oath, by interrogatories or otherwise, as he shall direct.

And the said parties, and each of them, are to produce and leave with such referee, as he shall direct, all books, documents, deeds, papers, vouchers, and writings, in the possession or power of such parties, or either of them, relating to the accounts or matters before such referee. And upon the coming in of the report, such further directions shall be made as may be just.

*No. 68, page 295.—Another Order in a Suit of One on Behalf of Himself and Others under an Assignment.*

C. L.
*vs.*
A. G. and others.

At a Special Term of the Supreme Court, held, etc., on the 24th of February, 1863.

Present—W. F. ALLEN, Justice.

Upon reading the petition of Louis Jocklin and Charles Stackelin, and notice of motion and proof of service, and the judgment roll in this action in support of such motion, and reading affidavits of C. L., etc., in opposition, on motion of M. & S., attorneys for the petitioner, it is ordered, that the decree or judgment of this Court, made and entered in this action on the 30th of October, 1861, and the report of the referee on which the same was founded, dated the 4th of

* This clause of the order is rarely enforced, as ordinarily the fund bears, and is sufficient to meet the costs of all.

October, 1861, be, and the same are hereby vacated and set aside.

And it is further ordered, that it be referred to , as referee, to take and state the account of Christian Lindler, as assignee of Anthony Guiseman, and to inquire into and report as to the acts and doings of said assignee in relation to said assigned estate, and the money or property that has, or ought to have, come to his hands as such assignee, and the disposition made by him thereof.

And it is further ordered, that the said petitioners and the parties to said action be deemed parties to such reference, and entitled to notice of any proceedings in this action.

And it is further ordered, that such referee take and state an account of the amount due and owing by the said Anthony Guiseman to the said petitioners, and to any other creditors who shall come in and present and prove their claim as hereinafter provided.

And for the purposes aforesaid, the said referee is hereby directed at the instance of the said plaintiffs, or of said petitioners, to cause advertisements for such creditors to come in and establish their demands against such assignee, before said referee, at a place and by a day to be fixed for that purpose, and in such advertisements to be specified, which advertisements are to be published once in each week for at least six weeks in the newspapers published in the city of New York known as "The Evening Post" and "New York Daily Transcript." *

And the said referee is to fix a day for that purpose, and such of the creditors of said assignor as shall not come in and prove their debts by the time to be limited, or such further time as shall be allowed by the referee or the Court, shall be excluded from the benefit of this decree.

And it is further ordered, that the parties to this action, the said petitioners, and the creditors coming in, or either

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* See *ante*, p. 296, as to the statutory provision for advertising in the State Paper.

of them, may contest before such referee any claim presented to such referee, or any part of such claim; and may contest the claim of such assignee mentioned in said assignment, and may in like manner contest the right of the holder of any such claim to a dividend thereon in whole or in part.

And it is further ordered, that such referee ascertain and report what sums of money received under said assignment have been paid by the assignee to the creditors under the assignment, and to whom, and when paid, and also for any other purpose; and whether such assignee should be charged with interest, and to what credits or allowances he is entitled.

And further, such referee shall ascertain and report what, if any, of such assigned estate remains in the assignee's hands, or with which he is chargeable, and what disposition ought, in his judgment, to be made thereof.

And it is further ordered, that such referee may examine the said assignee, his agent or agents, and any witnesses touching the matters hereby referred to him, in such manner as he shall direct.

Such referee shall, in the request of any party, report to this Court the testimony taken before him, and any party may apply to this Court for further directions on the foot of this decree.

*No. 69, page 297.—Advertisement for Creditors.*

C. L.
*agst.*
A. G., F. T. A., and John J. S.

I, the referee in this cause, pursuant to an order or decree made therein on the 24th day of February, 1863, hereby give notice to all the creditors of said A. G., and said C. L., his assignee, to appear before me, at my office, No. 32 Pine street, in the city of New York, on or before the sixth day of June, 1864, to come in and prove their respective

claims; and that such of said creditors as shall not come in and prove their claims by that day, or such further time as shall be allowed by me or the Court, will be excluded from the benefit of said order.

Notice is further given, that I will proceed to a hearing of said matters referred to me at my said office, No. 32 Pine street, in the city of New York, on the said sixth day of June, 1864, at three o'clock in the afternoon; upon which hearing, any parties to the action, or any of said creditors, may contest before me any claim, or part of any claim, presented to me, or the claim of said assignee mentioned in the assignment, and may contest the right of the holder of any such claim to a dividend thereon, in whole or in part.

The creditors are required to make up and present their claims, verified by affidavit, showing the amount actually due on the 21st day of April, 1864, the dates and items of all debits and credits, the interest claimed, and the periods computed, stating the dates particularly.

Dated New York, April 21, 1864.

M. H., *Referee.*

M. & S.,
*Attorneys for Pl'ff.*

*No.* 70, *page* 300.—*Report.*

To, etc.

In pursuance of an order of this Court, made in the above cause, and dated the day of , I, the subscriber, the referee appointed thereby, do report:

That I have been attended on behalf of the parties, plaintiff and defendant herein, and have taken the account of the defendant, , executor of , deceased, as directed by such order. That the items and particulars of such account are set forth in the Schedules marked A, B, and C, to this report annexed, and making part thereof.

That in Schedule A I have set forth the sums annually received by such executor for each year of the accounting; and in Schedule B, the amount of his payments and credits during such year; and in Schedule C, I have stated the annual balances in his hands, and I have computed interest

on such balances after deducting commissions; and that the amount due by the said executor to the estate of the said is the sum of $ .

I further report, that I caused an advertisement to be inserted in the State paper, and in the , a newspaper published in the county of , where the testator resided at his death, and where the demands of the creditors were to be exhibited, for the creditors of the said , to come in and prove their demands before me by a day named therein.

That claims on behalf of J. D., of L. B., and C. R. have been laid before me. That I have examined and taken testimony as to the same, and I report:

That J. D. is a creditor of the estate of the said , deceased, for the sum of $ , principal and interest, of a promissory note dated the day of , made by the said , and delivered to the said J. D., and now held by him.

That L. B. is a creditor, etc.

I further report, that the said plaintiff has proved his demand against the said estate as set forth in the complaint, and that he is entitled to recover the sum of $ for principal and interest due him.

And I further report, that the funds or assets of the estate of the said , now on hand and to be distributed, are as follows:

The above sum of $ , the balance now in the hands of the said executor.

Twenty shares of stock of the, etc.

[Specify any property not converted by the executor.]

That the costs of the plaintiff, of the defendant, and of the creditors, J. D., etc., who have proven their claims before me, be paid out of such funds.

That out of the residue, the debt reported due to the plaintiff, and the several debts due to the creditors L. B., etc., be paid with interest thereupon from the date of this report.

All which, etc.

[If the parties entitled to the surplus are parties to the action, the judgment may comprise a distribution of such surplus.]

*Account of the Executor L. B.*

SCHEDULE A.

*Receipts.*

| | | |
|---|---|---|
| 1815. | | |
| Sept. 1. | Cash in bank drawn by executor | $1,200 00 |
| " | Cash note of J. C. | 200 00 |
| 1816. | | |
| Sept. 1. | Etc., etc, making an aggregate Sept. 1, 1816, of | $3,810 67 |

SCHEDULE B.

*Payments.*

| | | |
|---|---|---|
| 1815. | | |
| Sept. 1. | Paid Doctor. | |
| 1816. | | |
| Sept. 1. | Funeral expenses (and down to Sept. 1, 1816). | |
| | In the whole | $1,707 86 |
| | | $2,102 81 |

[In the same manner the account of each year was set forth down to and including 1820.]

SCHEDULE C.

| | | Principal. | Interest. |
|---|---|---|---|
| 1816. | | | |
| Sept. 1. | Balance due this year | $2,102 81 | *$588 75 |
| 1817. | | | |
| Sept. 1. | Balance due this year | 199 97 | 41 96 |
| 1818. | | | |
| Sept. 1. | Balance this year | 15 76 | 2 20 |
| 1819. | | | |
| Sept. 1. | Balance of this year | 535 66 | 37 35 |
| 1820. | | | |
| Sept. 1. | Balance of this year | 128 36 | $670 26 |
| | Total principal | $2,980 46 | |
| | Total interest | 670 26 | |
| | Total due | $3,650 72 | |

* Four years' interest.

*No. 71, page 300.—Separate Report upon a Claim.*

To, etc.:

Under an order of this Court made in this cause, and dated the day of , a claim was laid before me on behalf of J. D., as a creditor of the estate of , deceased, coming in in pursuance of an advertisement published by me for all creditors to present their demands.

That such claim was upon a promissory note made by the said for the sum of , and dated the day of , in favor of one C. L., and passed to the said J. D. after maturity.

That, from the evidence taken before me, I find that, after the making of such note, it was agreed by and between the said , deceased, and the said C. L., that such note should be cancelled and given up, on the transfer of certain demands against other parties held by the said . That such transfer was made and accepted, but such note was not delivered up.

And report, that I have disallowed such claim of the said J. D.

The evidence taken upon such claim is annexed to this report.

All which, etc.

*No. 72, page 306.—Forms as to Mechanics' Liens.*

*(A)—Notice of Lien to Clerk.*

To the Clerk of the City and County of New York:

Take notice, that B. M. have a claim against amounting to the sum of $ , for work and labor done, and materials furnished, toward the erection of a certain house or building, situated in the Ward, of the city of New York, on the side of street, owned by said That such work was done and materials furnished at the request of and in pursuance of a contract made with the said , etc.

The following is a diagram of said premises:

[Diagram.]

And I claim a lien upon such house or building, and the lot on which the same stands, pursuant to the provisions of an act of the Legislature of the State of New York, entitled "An act to secure the payment of mechanics, laborers, and persons furnishing materials towards the erection, altering, or repairing of buildings in the city of New York," passed May 5, 1863, and of the acts amending the same.

Dated 14th June, 1869.

(Signed.)

And sworn to with the verification of a complaint.

(*B*)—*Notice to Owner, etc.*

C. B.
*vs.*
H. V., etc.

Take notice, that on the 14th of June, 1869, I filed in the office of Clerk of the City and County of New York the notice required by law to perfect a lien for the sum of $1,330, upon the lot of and with the buildings thereon situated, and known as , etc., more particularly shown in the following diagram:

And that you are required to appear in the Court of Common Pleas, in and for the City and County of New York, on the 20th day of July, 1869, at ten o'clock in the forenoon, in Room No. 21, in the City Hall of said city, to abide such judgment as may be rendered thereon.

The following is a statement of the lien and the time of filing: 1869, June 14. Lien in favor of B. M. for $1,330.

Dated New York, June 15, 1869.

Yours, etc.,

B. M., *Claimant.*
C. Bros., *Attorneys,*
234 Broadway.

To H. V., W. P., and C. P.

*(C)—Order.*

At a special term of the Court of Common Pleas, held , on the 20th of July, 1869.

Present—Hon.

B. M.,
*vs.*
H. V., C. P., & W. P.

Upon reading and filing the notice to foreclose, entitled as above, with proof of service, on the defendants H. V., C. P., & W. P., and on hearing Mr. C., of counsel for the claimant, and Messrs, L. & H. for the defendant H. V., and Messrs. S. R. W. for the defendants C. P. and W. P., it is ordered that the claimant B. M. prepare and serve on the attorneys for the respective defendants, a statement of his claim herein duly verified, within twenty days from the date of the entry of this order, and that the respective defendants serve on the attorneys for the said claimant their answer or objections, if any they have, within twenty days thereafter.

*(D)—Complaint or Statement.*

The plaintiff and claimant states and shows, that heretofore and between the day of .

[The performance of the work on the premises fully described at the request and direction of the defendants, and the amount was then set forth.]

And he further states that the said premises were, at the time of the performance of the said work, and furnishing the said materials, and until the filing of the lien hereafter mentioned, the property of the defendants.

(The particular interests were stated.)

[The filing of the lien was then set forth, the date and the contents of the notice, to the Clerk.]

Wherefore the plaintiff and claimant prays judgment directing a sale of the interest of the defendants in the premises and appurtenances above described, to the extent of

the rights of the defendants, on the day of June, 1869, and directing that the proceeds of such sale be applied to the payment of the costs of these proceedings, and to the payment of the plaintiff's claim aforesaid, and that the residue of such proceeds, if any, be paid to the Clerk of the City and County of New York, to abide the further order of the Court.

C. B., *Attorneys.*

Verified 2d August, 1869.

(*E*)—*Answers.*

The answer was headed C. P. and W. P., to the complaint and claim of B. M., plaintiff and claimant. The statements are made in the same manner as in answers to a complaint under the Code.

(*F*)—*Order of Reference.*

At a Special Term, etc., held on the 21st of March, 1870.

Present—Hon. C. P. DALY.

On reading and filing the affidavit of the defendant V., with the order to show cause annexed thereto, why this cause should not be referred to some suitable person, to be designated by the Court as referee, with admissions and due proof of service of copies of said affidavit, and order on the attorneys of all the other parties in this action, and on hearing Mr. S., as counsel for the defendant V., in support of such motion, and Mr. C. of counsel for the plaintiff, in opposition thereto; and the said counsel, at the suggestion of the Court, after hearing said argument, having given their consent in open court that this cause be referred to under Section 7 of the Mechanics' Lien Law Act of 1863, now, on motion of S. and H., attorneys for the defendant V., it is ordered that this cause and the whole matter therein be, and the same is hereby referred to, to examine and pass upon the rights of the respective parties, and report upon the same in a summary manner, pursuant

to the provisions of Section 7 of the Act of 1863, chapter 500, entitled "An act to secure the payment of, etc." (*Ante, A.*)

### (*G*)—*Report under such Order.*

To the Court of, etc.:

I, the undersigned, appointed by this Court, by order thereof dated the 22d day of March, 1870, to examine, etc. (*terms of order*), do respectfully report:

That I have been attended, etc., and having heard their allegations and proofs, do find the following facts:

That the plaintiff, between the first day of May and the twelfth day of June, 1869, furnished materials and performed work, labor, and services, etc., in and about, etc., on the premises known as and described as follows, etc.

That the materials so furnished and the work so performed were worth the sum of $2,175.

[The report then stated the payments on account, the ownership and interests of the several defendants, the request of the parties for the work and materials, and some special matters not necessary to detail.]

The conclusions of law were then stated nearly in the usual form under orders to hear and determine. *That the plaintiff was entitled* to recover judgment against the defendants for his claim and interest from the 14th of June, 1869, being the sum of, etc.

That the defendant Donelly was entitled to recover from the plaintiff the sum of $ .

And that the judgment in this action direct: *First*, the payment of the costs and disbursements from the proceeds of the sale of the premises; *second*, the payment of the sum of $ to the plaintiff, being the amount of his claim and interest, less the amount of the defendant Donelly's claim against the plaintiff, with interest; and *third*, the payment of the sum of $ , with interest from the 14th of June, 1869, to the defendant Donelly.

And that the balance, if any, be paid to the Clerk of the

City and County of New York, to be disposed of according to law.

[The Report was filed under the rule. Notice thereof was given, and within the eight days exceptions were filed on behalf of the defendants C. P. and W. P. Then the cause was brought on at special term, and the judgment, of which the following is an abstract, made.]

### (*H*)—*Judgment.*

At, etc.:

This action being at issue upon the claimant's, B. M., *notice and bill of particulars* to enforce his lien hereinafter particularly described, and the defendant T. Donelly having filed a lien affecting the same premises, situate in the Eighteenth Ward of the city of New York, and known as No. 108 East Twenty-seventh street, which premises are fully described in the complaint and the referee's report herein, and upon the owners' answer and statement of damages by way of set-off (*recoupment*), and the same raising issues of fact and referable; and the Court having by an order of reference, entered on the 22d day of May, 1870, referred the same to T. F. L., counselor-at-law, of the city of New York, as sole referee to examine and pass upon the rights of the respective parties to this proceeding, and the whole matter therein, in a summary manner, pursuant to the seventh section of the Act of 1863, chapter 500, entitled "An Act, etc.," and the parties having proceeded upon such reference, the said referee made his report, and the same was filed with the Clerk of this Court on the 2d day of November, 1870; and more than eight days having elapsed since the filing of such report, together with a notice of the time and place of such filing duly served on the attorneys for the respective defendants, and no exceptions having been taken or appeal filed by either of the defendants, except by the defendants C. P. and W. P.

And judgment having been ordered in favor of the plaintiff and claimant B. M. against the defendants H. V., C. P.,

and W. P. And the referee reporting that judgment ought to be entered for, etc., for the sum of $ , beside costs, to be adjusted by the Clerk of the Court, and judgment having also been ordered for the claimant T. D., for the sum of $ .

And the costs of the said plaintiff being duly adjusted at the sum of $ , and the costs of the defendant T. D., being allowed by the clerk at the sum of $ . Now, on motion of , and on hearing on the exceptions filed, and on the question of costs and form of the decree.

It is ordered, adjudged, and decreed that the said report be and the same is hereby in all things confirmed, except as to the costs of the defendant T. D., which is modified so as to allow him costs against the plaintiff; and that the plaintiff recover of the defendants H. V., C. P., and W. P., the sum of $ , the amount of principal, interest, and costs, with interest from the 1st of , the date of such report, amounting in the aggregate to $ .

And it is further ordered, adjudged, and decreed that the defendant T. D. recover of the plaintiff the sum of, etc.

And it is further ordered, adjudged, and decreed that the premises described in the plaintiff's notice to foreclose his lien, and known as No. etc., be sold under the direction of the Sheriff of the city and county of New York, at public auction in the city of New York. That the said Sheriff give public notice of the time and place of such sale, that he sell at such sale all the right, title, and interest which the said defendants H. V., C. P., and W. P. had in the building and premises and lot of land on which the same stood at the time the notice creating the same lien was filed, to wit, the 14th day of June, 1869; and that out of the proceeds of such sale he *first* pay his fees and expenses as allowed by law.

(2) That he pay C. W., the attorney of the plaintiff, the sum of $ ; his costs.

(3) Donelly's costs.

(4) The sum due plaintiff.

(5) The sum due Donelly.

That he take receipts for such payments and file the same in the office of the Clerk of the city and county of New York.

That if the proceeds of such sale be insufficient to pay the full amounts so adjudged for principal, interest, costs, and disbursements, that the sheriff specify the amount of such deficiency in his report of sale; and the defendants H. V., C. P., and W. P., owners and defendants, pay the same; and the plaintiff B. M. have execution for the amount of such deficiency against the property of the said H. V., C. P., and W. P.

And if the proceeds arising from such sale be more than sufficient to pay the sums hereinbefore adjudged to be paid, that the residue be paid to the Clerk of the city and county of New York, to abide the further order of this Court.

That the said sheriff execute to the purchaser or purchasers of the premises a deed or deeds for the premises sold by him.

Such premises are particularly described in the notice of lien, complaint, and report as follows, to wit:

All, etc.

*No. 73, page 317.—(A)—Order under Act as to Trustees of Insolvent Debtors.*

SUPREME COURT.

| | |
|---|---|
| In the matter of the debt claimed to be due from L. B. to the estate of M. D., deceased. | Date . |

On reading and filing an agreement signed by the above-

named L. B. and by G. D., trustee of such estate (or upon reading and filing a notice of a motion for the appointment of a referee in this matter, and due proof of service thereof), it is ordered, that it be referred to C. D., as sole referee, to hear and determine the controversy between the said parties, as to such debt.

*(B)—Report under such Order.*

SUPREME COURT.

| |
|---|
| In the matter of the debt claimed to be due from L. B. to the estate of M. D., deceased. |

To, etc.:

In pursuance of an order of this Court, made in the above matter, and dated the day of , I, the referee thereby appointed, do report:

That I have examined into the controversy referred to be determined; and having heard the allegations and taken the testimony of the witnesses, and other evidence produced, I find and determine:

That the above-named is indebted to the estate of , deceased, and to the trustees of such estate, in the sum of $ .

All which is respectfully submitted.

Dated .

*No. 74, page 320.—In cases of Receivers' Mutual Insurance Companies.*

(*A*)—*Order of Reference.*

SUPREME COURT.

In the matter of the demand of J. D., Receiver of the Mutual Insurance Company,

*against*

C. R.

At, etc.:

It appearing from the affidavit of J. D., receiver of the , that a controversy has arisen between such receiver and C. R., alleged to be a debtor to such company; and that a personal demand for payment of the claim has been made and refused. And on reading and filing a written consent that such claim be referred to J. M., as referee (or on application being made and due notice thereof given for a reference), to hear the proofs and allegations of the parties and report upon the same. Now, on motion of , it is ordered that it be referred to , as referee, to take such proofs, and report upon such claim and controversy.

(*B*)—*Report.*

The report may readily be framed upon the precedent No. 72 *B*.

*No. 8 A.—Findings and Report.*

[Misplaced accidentally. Should have been on page 324 of this Appendix.]

To, etc.:

In pursuance to an order made in the above cause, and dated the day of , I, the subscriber, to whom it was referred as sole referee to hear and determine the same, do report:

That I have been attended on behalf of the parties plaintiff and defendant herein, and having heard their allegations and proofs I find the following

FACTS:

I. That on or about the day of , the defendant W. B. executed and delivered to one J. M. the bond and mortgage mentioned in the complaint herein; and that the same was duly assigned by the said J. M. to the present plaintiff, on the day of , as set forth.

II. That the consideration for such bond and mortgage was the part payment or satisfaction of a debt incurred by the said W. B. to the said J. M., upon the sale and transfer to him of the property, machinery, goods, and articles, known as the Mills and factory, situated at , in the State of .

III. That no false, deceptive, or fraudulent allegations or statements as to the value or situation of the last-mentioned property were made by, or by the authority or connivance of the said J. M. upon such sale or transfer, or any agreement therefor.

[In a case raising a similar issue as to fraudulent representations inducing a transfer of property, and security given for it, the referee found as follows:

That no satisfactory testimony has been given before me to establish that any false or fraudulent representations, etc., were made, etc.]

IV. That the promissory notes mentioned in the answer as put into the hands of the plaintiff, to be collected on account

of the defendant, have not been collected in whole or in part; that the same were of no value; and the plaintiff has not received anything therefrom, and is not chargeable with any amount on such account.

V. That the amount due upon such bond and mortgage for principal and interest at the date of this report is the sum of $ .

CONCLUSION OF LAW.

That the plaintiff is entitled to judgment of foreclosure and sale of the mortgage set forth in the complaint, and payment of the amount due as above stated, with his costs.

And I direct that judgment be entered accordingly.

# ADDENDA.

(*A*)—Rule 8 of the Supreme Court is amended in the last clause, to take effect February, 1875, so as to read:

"In no case shall an attorney be surety on any undertaking, *or bond required by law in any action or proceeding*, or be *bail in any civil or criminal case or proceeding.*"

(*B*)—*Pages* 151–164.—*See post*, *E.*

Rule 24 as to the affidavit of service of the summons in a divorce case is altered so that the last clause reads:

"The Court may require the affiant to appear in Court *or before the referee if a reference is ordered, and be examined in respect thereto.*"

(*C*)—*Page* 69.—*Case.*

The 41st Rule is altered by changing the word "find" to the word "pass," in the second paragraph, so that it reads, "The justice or referee shall thereupon correct and settle the case according to the facts, and shall at that time *pass* on such other questions as may be required by either party, and be material to the issue."

(*D*)—*Page* 246.—*Surplus Moneys.*

Rule 77. The following clause is added to this rule:

"And the party moving for the reference shall show by affidavit what unsatisfied claims appear by such official

searches, and whether any and what other unsatisfied liens are known to him to exist."

This change may throw some light upon the question noticed in the text as to the liens which may be inquired into under the rule; whether those by judgment or decree are alone within it. The official searches would show liens of a legal nature, under which the property could be taken at law; *other unsatisfied liens* may be those which can only be declared and enforced in equity.

We may notice that the 136th Rule of the Court of Chancery, as revised and published in 1837, had the language, "which is a lien upon such surplus moneys," not "a lien by judgment or decree." The 93d Rule of 1847, in equity, was in this particular precisely the same as the Chancery Rule. Between 1847 and 1858 the words "by judgment or decree" were introduced. In the revisiou of 1858 they were omitted and the language of the old Chancery Rule restored. Under that rule we apprehend that liens of a merely equitable nature could be inquired into. (Arnold *vs.* Patrick, 6 Paige, 110; Sweet *vs.* Jacocks, *Ibid*, 355; Burchard *vs.* Phillips, 11 *Ibid*, 66.)

Under the existing rule and the case from 47 Barbour's Reports, quoted in the text, we presume all claims, equitable or legal, may be presented and examined.

### (*E*)—*Pages* 151, 164.—*Divorce, etc.*

Rule 87 is altered and now reads, "When an action is brought to obtain a divorce or separation, or to declare a marriage contract void, if the defendant fail to answer the complaint, or if the facts charged in the complaint are *either expressly or by non-denial, admitted by the answer, and no defense is set up by the answer*, the Court to which application is made for judgment shall order a reference, to take proof of all the material facts charged in the complaint.

"The Court shall in no case order the reference to a ref-

eree nominated by either party, *nor to a referee agreed upon by the parties, nor without proof by affidavit conformably to Rules* 23 *and* 24, *of the service of the summons and complaint. And notice of appearance and retainer shall not be sufficient.*"

At the end of the rule is added: "*And in case of reference, the plaintiff shall be specifically examined on oath as to each of these particulars.*" (*See B., ante.*)

(*F*)—*Pages* 169, 176.—*Annulment.*

At the end of Rule 88 is added: "*And in case of reference, the plaintiff shall be examined specially as to these facts.*"

(*G*)—*Page* 199.—*Guardian to Sell.*

The 67th rule has this clause added:

"It shall also be shown by the petition or affidavit whether any previous application has been made, and if any, the time thereof, and what disposition was made of the same."

(*H*)—*Page* 135.—*Damages in Injunction Cases.*

In Troxell *vs.* Haynes (16 Abbott, N. S., 1) the rule was affirmed that only damages for the expenses directly incurred by reason of the injunction could be allowed on the reference, not general costs of the action.

And it was held that, although the report settled the amount of damages as against the sureties, if they were liable, that liability could only be decided in an action on the undertaking.

(*I*)—*Page* 11.—*Reference on the Ground of a Long Account.*

In Evans *vs.* Kalbfleisch (16 Abb., N. S., 13, Superior Court, General Term) it was held that the rule must now be deemed settled, that the Courts have not power to refer the

trial of an action, where any issue raised on the complaint is such, that the objecting party has a right to a trial by jury. All the causes stated in the complaint must be referable.

The cases are cited in which it has been held, that if *one* issue raised involved the examination of a long account, the whole cause might be referred; and it is concluded that they are overruled by later authorities, especially by Townsend *vs.* Hendricks. (*Ante*, page 21.)

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